No. 93-7407

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ROBERT O'NEAL,

Petitioner,

vs.

FRED McANINCH, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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THE STATE OF OHIO

VS.

LELAND T. WARESS
GARY M. GABBARD
LLOYD G. ALLEN
ROBERT LAWRENCE O'NEAL
LOLA GAIL TONEY
DIMPLE PODBORNY

A TRUE BILL
INDICTMENT
FOR

AGGRAVATED MURDER R.C. 2903.01 W/CT

AGGRAVATED ROBBERY R.C. 2911.01 W/CT

KIDNAPPING R.C. 2905.01

DATE OF OFFENSE
On or about January 29th, 1981

THE TERM OF
JANUARY OF 1981

CASE NO. 163540 (Filed Mar. 27, 1981)

The State of Ohio,)
CUYAHOGA COUNTY) SS.
)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely *and with prior calculation and design, caused the death of another, to-wit: Henry Podborny,*

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Illegible
Foreman of the Grand Jury

/s/ John T. Corrigan
Prosecuting Attorney.

THE STATE OF OHIO

VS.

LELAND T. WARESS
GARY M. GABBARD
LLOYD G. ALLEN
ROBERT LAWRENCE O'NEAL
LOLA GAIL TONEY
DIMPLE PODBORNY

A TRUE BILL
INDICTMENT
FOR

AGGRAVATED ROBBERY R.C. 2911.01

DATE OF OFFENSE
On or about January 29th, 1981

THE TERM OF
JANUARY OF 1981

CASE NO.

The State of Ohio,)
CUYAHOGA COUNTY) SS.
)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely did, in attempting or committing a theft offense, as defined in Section 2913.01 of the

Revised Code, or in fleeing immediately after such attempt or offense upon Henry Podborny, have a deadly weapon or dangerous ordnance, to-wit: iron bar, on or about their person or under their control

AND/OR

and in attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense did inflict, or attempt to inflict serious physical harm on another, to-wit: Henry Podborny,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Illegible
Foreman of the Grand Jury

/s/ John T. Corrigan
Prosecuting Attorney.

THE STATE OF OHIO

VS.

LELAND T. WARESS
GARY M. GABBARD
LLOYD G. ALLEN
ROBERT LAWRENCE O'NEAL
LOLA GAIL TONEY
DIMPLE PODBORNY

A TRUE BILL
INDICTMENT
FOR

KIDNAPPING
R.C. 2905.01

DATE OF OFFENSE
On or about January 29th, 1981

THE TERM OF
JANUARY OF 1981

CASE NO.

The State of Ohio,)
) SS.
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely *and by force, threat or deception removed Henry Podborny from the place where he was found or restrained him of his liberty for the purpose of facilitating the commission of a felony or the flight thereafter and/or terrorizing or inflicting serious physical harm on Henry Podborny, and failed to release the victim in a safe place unharmed,*

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ Illegible
Foreman of the Grand Jury

/s/ John T. Corrigan
Prosecuting Attorney.

Court of Common Pleas of Cuyahoga County, Ohio
Ohio v. Robert O'Neal

VOLUME 5

* * *

[1750] Q Can you tell us, Mrs. Toney, how long a period of time you have known Robert O'Neal?

A Approximately eight years.

Q All right. Do you have any association with him?

A Not presently.

Q Did you ever work for him?

A Yes, sir, I did his books.

Q All right. And in addition to being Mr. O'Neal's bookkeeper, did you act as a bookkeeper for anyone else?

A No, sir, just my husband and myself.

* * *

[1763] Q. Tell us what was said.

A. She wanted to hire somebody to protect her family, or an organization to protect them, and I told her I would check and find out and I would get back to her.

Q. Did you have any further conversation with her concerning this protection from the time you were in Chicago or the Chicago area in May of 1980?

A. No, sir.

* * *

[1764] Q. After having this conversation with Dimple Podborny concerning protection did you leave the Chicago area?

A. Yes, sir.

Q. All right. And what did you do when you came back to Cleveland?

A. I talked to James McLean.

Q. Who is James McLean?

A. The gentleman that we talked about earlier that I have known for approximately eight or nine years.

Q. I believe you said he was a loan officer?

A. He was at an industrial corporation.

Q. Where did you have conversation with Mr. McLean?

A. At Howard Johnson's Restaurant on 21.

Q. Do you know what city that's located in?

A. Independence, Ohio.

* * *

[1769] Q. How long did this conversation take place between yourself and Mr. McLean sometime in late May at the Howard Johnson's in Independence?

A. The best I can remember it was about half an hour.

Q. What specifically was said at that meeting?

A. He said that we could get some money by conning her.

Q. All right. Did you and I –

MR. ATKIN: Objection on behalf of Mr. McLean.

Q. I am referring to –

THE COURT: Overruled.

MR. D'ANGELO: We join in that.

Q. I am referring to you and Mr. McLean, did you strike a plan at that time?

A. Yes, we did.

Q. What was your agreement between yourself and Mr. McLean?

A. That my mother-in-law would come to Cleveland and I would introduce him as Stan.

* * *

[1809] Q All right. And how many Sonnys are involved in this particular case?

A Two.

Q What are the names of the two Sonnys?

A One is Sonny Pace and one is a fictional Sonny.

Q A fictional Sonny?

A Yes, sir.

Q And whose brain child was this fictional Sonny?

A Mr. McLean's and I.

Q What was the purpose in creating this fictional Sonny?

A We needed someone in authority and we picked that name.

Q Did you have conversations with your mother-in-law concerning this individual, this fictional individual named Sonny?

A Yes, sir.

Q And when did these conversations take place?

A At different times.

Q Did any of them take place in August of 1980?

A Yes, sir.

* * *

[1818] Q In September, did you have any direct contact with Robert O'Neal?

A Yes, sir.

Q And when and under what circumstances did you have contact with him?

A He came to Chicago, I think, two times during September and I talked to him on the phone.

Q Do you know what his number is?

A I don't remember it.

Q Did you have his number in your possession when you were at the Holiday Inn?

A Yes, sir.

Q Did you make a long distance phone calls [sic], if you know, to Mr. O'Neal while at the Holiday Inn?

A Yes, sir.

Q Now, you testified that there came a time that you gave to Mr. O'Neal $6500.

A Yes, sir.

Q Now was that one of the meetings that you had in Chicago?

A No, sir. I think that was before.

Q When before?

A September.

* * *

[1820] Q What was the purpose of these meetings?

A He came up to try to sue my mother-in-law.

Q What do you mean he came up to try to sue your mother-in-law?

A She was getting very upset.

Q Why?

A She wanted something done. She had paid her money and she wanted something done.

Q As relates to Henry?

A Yes, sir.

Q And what was his involvement?

What was his involvement at this time in conjunction with soothing your mother-in-law?

A Nothing. He just tried to calm her down.

Q And were you present when there was a meeting between Mr. O'Neal and your mother-in-law some time in the summer of 1980?

A Yes, sir.

Q Where did that take place?

A Holiday Inn.

* * *

[1823] Q Did you have any further contact with McLean and/or Robert O'Neal when you arrived back in Cleveland some time in the latter part of September or early October, 1980?

A Yes, sir. I talked to them on the phone just about daily.

Q What were the nature of the conversations that went on between yourself and Mr. O'Neal in October of 1980?

A Mostly about money.

Q You said mostly about money.

What do you mean?

A He was always broke.

Q Did you have any conversation with him concerning this fictitious Sonny?

A Bob knew that he was made up.

MR. ATKIN: Objection, your Honor.

THE COURT: Sustained.

Q Did you give Mr. O'Neal any more money in October of 1980?

A I don't think so during October.

* * *

[1858] BY MR. CORRIGAN:

Q. Did you, in fact, drop your father-in-law off at Bob O'Neal's restaurant?

A. Yes, sir, I did.

Q. What, if anything, did you observe him do?

A. He walked inside.

Q. And what did you do after you observed him walk inside the building?

A. I drove down to the gas station.

Q. Why did you drive down to the gas station?

A. To wait.

Q. Was that prearranged?

A. Yes, sir.

Q. How was it prearranged?

A. By conversations with Bob.

Q. When did these conversations take place?

A. I don't know the exact day.

Q. What were the nature of the conversations?

A. Telling me exactly what to do.

Q. What did he tell you to do?

A. To drop him off and drive down to the corner and wait.

Q. And you did that?

A. Yes, sir.

[1859] Q. How long a period of time were you down at the corner before something happened?

A. About five or ten minutes. I am not sure of the time.

Q. All right. And what, if anything, happened five or ten minutes after you dropped your father-in-law, Henry Podborny, off at 11023 Superior?

A. Bob brought me the keys and wallet and travelers checks.

Q. Whose keys, whose wallet, whose travelers checks?

A. My father-in-law's.

Q. I'm going to show you, Mrs. Podborny, that which has been marked for purposes of identification as State's Exhibit 66, and State's Exhibit 64. Would you look at these two plastic containers, please?

A. Mrs. Toney.

Q. I'm sorry. Mrs. Toney.

A. I don't know. It was just keys. I don't know.

Q. Have you ever seen – you can take them out of there if you want.

A. I wouldn't recognize them. Just keys, a handful of keys.

* * *

[1939] BY MR. CORRIGAN:

Q I think when we broke, Mrs. Toney, we were into the middle or latter part of March, 1981.

Do you have that time frame now?

A Yes, sir.

Q All right. Did there come a time in March of 1981 that you had conversations with Mr. Robert O'Neal?

A Quite a few times.

Q All right. Did there come a time during the latter part of March, 1981, where you had conversation with Mr. Robert O'Neal concerning payment of some money?

A Payment of money?

Q Yes.

A Not that I can recall.

Q All right. You were in Chicago in March of '81, were you not?

A Yes, sir.—

Q Did there come a time that you had conversation with James McLean?

A Yes, sir.

Q What was the nature of that conversation?

A I told him that Bob wanted $500 for keeping Hank.

VOLUME 7

[2345] Q You thought that the federal agents and the federal government out of the goodness of their heart just decided government out of the goodness of their heart just decided not to prosecute you for the pending federal charges?

A I thought they figured I had enough state time to wait for me for 20 years to put me in federal prison.

Q Well, do you know why they waited? By the way, you had already cut your deal, to testify before you came back to Cleveland, didn't you?

A Yes, sir. We signed an agreement [sic] in Columbus.

* * *

VOLUME 9

[2952] Q. Did you discuss money or fees at that time?

A. Yes, I was going to discuss fees with Dimple, and at that point Gail said, "I would like to talk to you for a minute," and we went out into the corridor, and she said, "Tell her," meaning Dimple, "it will cost $5,000."

Q. That discussion with Gail Toney was out of the hearing of Dimple Podborny and Linda?

A. Yes.

Q. Did you ever learn Linda's last name, by the way?

A. I think I may have heard it. I don't recall it.

Q. Did you return back to the lounge?

A. Yes.

Q. And what discussion ensued, if any, at that time?

A. I told Dimple Podborny that we could see that Linda and also her son, James, were protected from Henry, for $5,000.

Q. What was Dimple's reaction to that?

A. She said, "Fine." She didn't have the money, the 5,000. She had a ring and she wanted to know if we could use the ring instead of the money.

* * *

[3064] A. Not that particular phone, only that I have discussed with the FBI, after several of these phone conversations from the Holiday Inn, Richfield, that any future phone calls, try and put through an Ohio Bell number rather than a Western Reserve Telephone Company number.

Q. Now, you –

A. The pay phone number in Richfield is a Western Reserve Telephone Company.

Q. Pardon me?

A. The pay phone in Richfield is a Western Reserve Telephone Company, and their equipment is not the best.

Q. Now, also in the early part of that discussion you were talking about "the gentleman that we talked about last night that still owed some money"; who are you talking about there?

A. Bob O'Neal.

Q. You make a statement, "I've arranged with my friend up on Mayfield." Why did you make that statement?

A. In reference to getting something done with O'Neal, I guess.

Q. You claim is name is Mr. S.

* * *

[3068] A. Yes. It's dated March 19, 1981. It's my signature on the cassette.

Q. Would you look in the upper left-hand corner of the envelope marked State's Exhibit 49. Tell the Court and jury what the date and time is.

A. March 19, 1981, 5:50 p.m.

Q. Who were you talking to on there?

A. Gail Toney.

(Thereupon, State's Exhibit 49 was played in total. Upon completion of same, the following proceedings were had:)

THE COURT: Do you want to complete, Mr. Marino? You can conclude on that tape if you so desire.

MR. MARINO: Okay, Your Honor.

THE COURT: And we will take a recess.

BY MR. MARINO:

Q. Mr. McLean, State's Exhibit 49, the tape that we just listened to, you originally talked at the opening about "this situation with O'Neal." What situation are you talking about?

A. The money that she said that she owed . . .

* * *

[3111] . . . . I asked her why O'Neal had moved Henry to White's. She told me that Lee Warress had visited O'Neal's with a gun and had been threatening to expose her and O'Neal.

"I asked Gail if Henry was still alive, and she said, yes, that O'Neal had arranged with a nurse to have him fed intravenously.

"On March 23, 1981, Gail told me in person, in my automobile, while I was driving from the airport to Howard Johnson's on Route 17 and 21, she told me that she was going to meet Robert O'Neal, the balance of $400 that she owed him for holding Henry."

That's exactly how it's typed.

"She also told me O'Neal was going to advise her what he had done with Henry after she – after her received the $400. And later that same afternoon Gail told

she had given the $400 to O'Neal, but he refused to tell her where –" I guess it's where, were " – where Henry was, except to say Henry was still alive.

* * *

[3227] BY MR. D'ANGELO:

Q. Do you recall your testimony at the last trial, sir?

A. Yes, I think so.

Q. Do you also recall that you made a written statement in connection with this incident, right?

A. Yes.

Q. Now, did you not testify at the last trial the following – it's also part of your statement – "On January 29, 1981 at 11:30 p.m. Gail called me at my home and she asked me if I could meet her at the Holiday Inn parking lot in Richfield, Ohio. I met her there at midnight, and she advised me that she and her brother, Gary Gabbard, had grabbed Henry and tied him up."

Do you remember saying that?

A. Yes.

Q. Is that in fact what she told you?

A. Yes.

Q. Was it true?

A. I don't know whether it was true or not.

Q. Was it true that she told you that?

A. Oh, it was true that she told me that, yes.

Q. She told you that on the telephone, right?

A. No.

[3228] Q. She told you that when she met you at the parking lot at the Holiday Inn, right?

A. That's correct.

Q. What did she tell you over the telephone when she called you up?

A. Just wanted to know if I could meet her.

Q. As a matter of fact, during that telephone conversation where she called you from Captain Frank's, right –

A. She said she was at Captain Frank's, yes –

Q. She told you that she was so nervous, right?

A. No.

Q. Do you recall at the last trial that you testified as follows:

"I said, 'Where are you?' And she said, 'I am at Captain Frank's.'

"I said, 'What are you doing down at Captain Frank's?'

"And she said, 'I don't know how I got down here. I am so nervous.'

"And she said, 'Can you meet me at the Holiday Inn in a half hour, the Holiday Inn at Richfield?' "

Do you remember saying that at the last trial?

A. Yes, that's correct.

Q. So now you remember she said she was nervous, [3229] right?

A. Yes, sir.

Q. And do you recall that when she arrived at the Holiday Inn to meet you, was she also nervous at that time?

A. Yes.

Q. How would you describe her appearance as you observed her at that time?

A. Well, her appearance was normal. She was very nervous, very upset, very excitable.

Q. And she told you that she and her brother grabbed Henry Podborny, tied him up, took his money, right?

A. Yes.

Q. And did she also say there was a large set of keys lying on the car seat?

A. Yes.

Q. And is it not a fact, sir, that after telling you that she and her brother grabbed and tied up Henry Podborny, is it not a fact, sir, that she gave you some American Express traveler's checks?

A. Yes.

Q. She gave you his driver's license?

A. Yes.

Q. And an American Express card?

[3230] A. Yes.

Q. And you took those items, didn't you?

A. Yes.

* * *

VOLUME 10

[3653] A. This is the examination of blood and body fluids, immunological and chemically.

Q. Now, Miss Cowan, you said you examined some pieces of paint from the body, is that correct?

A. Yes.

Q. Were you ever able to match that up, that paint with any other type of paint submitted to you?

A. Not specifically.

Q. Generally?

A. There were similarities –

Q. All right.

A. – of some of the paint collected at 11023 Superior, but there was nothing to positively determine, excluding any other source.

Q. What similarities did you notice from the paint from 11023 –

* * *

A. Similarity in color, that is, tint of color and in porosity of the type of paint.

* * *

[3665] Q. What else did you do in regard to the body on the 25th?

A. Basically after the undressing was to hang the clothing up, due to the condition. It was wet and there were magots [sic] present.

Q. How did you process the clothing in regard to the, at least, the external particles that you saw on it, the dirt and the magots [sic] and so on?

A. After I let it dry on Monday, I took the clothing and that was viewed, and there was paint-like chips, brown, brown on white found.

There was sawdust present. Basically it was more or less going over it with Miss Cowan to see –

* * *

[3676] A. Yes. On May 1st, 1981, I was taken to a place at 11023 Superior.

Q. Would you take a look at State's Exhibit 14 and 14-A through F before you. Do you recognize State's Exhibit 14?

A. Yes, I do.

Q. What is that, please?

A. That is the door at 11023 Superior.

Q. Did you go into that establishment?

A. Yes, I did.

* * *

[3701] BY MR. ATKIN:

Q. Now, when you were at the establishment at 11023 Superior, did you observe a pool table there?

A. Yes.

Q. You did? Was there a pool table cover missing from that pool table?

A. Yes.

Q. Did you make a test on this and determine whether or not that pool table cover came from that pool table?

* * *

A. The pool table coverings received as evidence was for comparison with the one received with the body.

Q. Okay. Well, what about the pool – You are saying there was a pool table in the –

A. Right.

Q. Did you make any comparison with that, the pool table and the covering?

A. No. I was looking for a color and a physical match, which was not found.

VOLUME 11

[3710] Q. Does that restate all your findings in connection with the examination and autopsy of Mr. Podborny's body?

A. Yes, this is the complete report, including all the vital organs, those which were normal, abnormal, those which were sick and those which were injured.

Q. Doctor, showing you what has been marked for identification purposes as State's Exhibit 3, would you take a look at that item, please, and tell the jury what it is?

A. Yes. This is one of your evidence envelopes which I recognize my handwriting, and it contains the deformed bullet which we found in Mr. Podborny's cranial cavity in the brain.

Q. Doctor, showing you what has been marked for identification purposes as State's Exhibits 1 and 1-A through 1-Q, would you take a look at each one in reverse order as it appears right now?

A. Yes.

Q. Explain what it is and show it to the jury, if you are going to define anything in that photograph.

* * *

[3711] State's Exhibit 1-J the body has now been brought with the cart into our autopsy room completely unclothed, naked, showing his appearance as he was before we did anything to change it.

Q. Now, Doctor, on that last exhibit, what is the state of Mr. Podborny's body as far as composition or decomposition as you observed it at that time?

A. The changes that are present here indicate he has been dead for a period of at least weeks. The body has undergone postmortem change in cold weather. Had he

[3712] been dead this long in June, July or August, he would have looked totally different, but he has been dead and the body has undergone postmortem deterioration, or gone bad after death.

State's Exhibit 1-I is again his body completely unclothed from a different angle.

State's Exhibit 1-H shows his back of his trunk. The other he is lying face up. Here he is on his side to show his back. It indicates he has been lying on his back after he was dead, because the blood has been squeezed out of the skin of the back because of pressure of the back on a hard surface.

Q. And is there a term for that, Doctor?

A. Well, that would be postmortem lividity or the settling of blood after death. When blood circulation ceases, the blood goes to the lowest part of the body.

Then we go to State's Exhibit 1-G of his face, which shows his lower teeth in fair condition, his upper teeth in very, very poor condition.

State's Exhibit 1-F shows the overall appearance of his face with a green discoloration, because also in the wrappings with the body was a piece of green cloth. It looked like the green cloth that you see on the pool table. That was laying on his face, and apparently from the weather, rain, snowing, melting snow, . . .

* * *

[3724] Q. Did you see anybody in the Justice Center?

A. Yes.

Q. Who did you see?

A. Bob O'Neal.

Q. Now, Mr. Higgins, did you sign a visiting card before you went to see Mr. O'Neal?

A. Yes.

• • •

[3725] Q. Now, Mr. Higgins, showing you what has been marked for identification as State's Exhibit 86, you see the number 86 on there, sir?

A. Yes.

Q. Do you see your signature on that card?

A. Right here (indicating).

Q. Would you point, hold it up and show it to the jury? Is that your signature?

A. That's my signature.

Q. Now, Mr. Higgins, can you read?

A. No.

Q. Did you fill out that card, other than sign your signature?

A. No.

Q. Who filled out that card?

A. The girl they call Jannie.

Q. Pardon me?

A. Jannie.

Q. And you signed it?

A. Yeah.

Q. Now, did you have a very long wait from the time you got to the jail until you saw Mr. O'Neal?

A. Yes, it was a good wait, because there was a long line of peoples.

Q. Did you eventually get to see Mr. O'Neal that day?

[3726] A. Yes.

Q. Who was with you when you saw him?

A. Jannie.

Q. Would you tell the Court and the jury what occurred and what happened once you saw Mr. O'Neal?

A. He told me he was a – he told me it was a body out there in the field.

Q. You have to keep your voice up, sir.

THE COURT: He told me –

A. He wanted –

THE COURT: He told me there was a boy out there in the field.

Q. He didn't say a boy.

A. A body out there in the field next to where I live at in a plastic bag.

Q. Pardon me?

A. He said a body out there in the field in a plastic bag.

He told me to go out there and cover it up, say his life is in my hands.

Q. Did he tell you anything about how the body got there?

A. He said that's the body that him and Lloyd killed the man and put out there.

Q. How long did your talk with Mr. O'Neal last?

[3727] A. About two minutes.

Q. Well, Jannie Morton – excuse me, was the girl named Jannie there also?

A. Yes.

Q. When he said there was a body out in the field, do you know which field he was talking about?

A. He told me the field next to me, yeah, I know.

Q. Up until that time did you know that there was a body in that field?

A. No, I didn't.

Q. When you met with Mr. O'Neal in jail, did you know why he was in jail?

A. No, I didn't.

Q. When he told you that "that's the man that I and Lloyd killed," did you ask him any questions about that killing?

A. No, I didn't ask him no questions.

Q. Did the girl named Jannie ask him any questions?

A. Yeah. They the one that talked a long time.

Q. Did he ask you to do anything about that body in the field?

A. He told me to go out there and cover it up.

Q. And after your meeting with Mr. O'Neal, where did you go?

A. Back home.

[3728] Q. Who took you there?

A. She did.

Q. When you say "she," who do you mean?

A. Jannie.

Q. Now, Mr. Higgins, did you ever go to that field to see if there was a body there?

A. No, I didn't go.

Q. Why didn't you go?

A. I didn't want to be involved.

Q. Did you ever go back there and look at the body?

A. Unh-unh, not –

Q. Did there come a time when you talked to a city health inspector?

A. Yes, I did.

Q. And about how long after you talked to Mr. O'Neal did you talk to the health inspector?

A. About two weeks.

Q. Do you know that man's name?

A. No, I just know him when I see him.

Q. Can you describe him?

A. Tall, dark, kind of – not too skinny.

• • •

[3733] Q. In relation to that spot where the body was found, when you saw Mr. O'Neal's car there that winter night – was it nighttime or daytime when you saw the car there?

A. Nightime.

Q. Do you know about what time it was?

A. About 10:00 or 10:30.

Q. And if you can, estimate for us how close was the car parked at that time to where the body was found at a later date?

A. About ten or twelve feet.

• • •

[3758] BY MR. D'ANGELO:

Q. Were we nice to you?

A. Yeah, you were nice to me.

Q. Now, Mr. Higgins, when the police first came to arrest you, sir, how many police were there?

A. I don't know. There were a bunch of them.

Q. Were there more than two?

A. Yes.

Q. Do you know if there were any FBI agents there when they came out to your place?

A. I don't know.

Q. And they put you in handcuffs?

A. Yeah, they put me in handcuffs.

Q. When they came to your place, they put you in handcuffs and took you downtown, right?

And isn't it true, Mr. Higgins, you told Mr. Milano and Mr. Coghlan and myself that they kept you in jail for about five hours when they picked you up that day, right?

A. Yes, I stayed down there about five hours.

Q. And they put you in a holding cell, right, in a cell with bars on it?

A. Yes.

[3759] Q. And you were there for about five hours?

A. Yes.

Q. And you would –

THE COURT: Once, once is enough. You are just repeating.

I am telling the attorneys, I don't want repeated questions. It's something new in Ohio.

MR. D'ANGELO: Objection to the comments.

THE COURT: Continue.

BY MR. D'ANGELO:

Q. And isn't it true, Mr. Higgins, they would come to see you back and fourth a couple times, right?

A. They just talked to me one time.

Q. They came to see you one time, then they left, and then they came back again, right?

A. No.

Q. Didn't you tell us that the other day?

A. What?

Q. Didn't you tell us the other day that the police came to see you when you were behind the bars, then they left you and then they came back a couple of times and told you until you tell them what they want to hear that you may be charged with this murder?

[3760] A. Yes, they said that.

* * *

[3761] BY MR. D'ANGELO:

Q. Did they also tell you you could go to jail, to the penitentiary for the rest of your life; didn't the police tell you that?

A. Yes.

Q. And they told you that at first when you were telling them what they didn't want to hear about that, isn't that the truth?

A. No, they didn't say that. I told them myself of my own free will.

Q. Did you tell that –

THE COURT: Wait a second.

Repeat that.

Did you hear that? Repeat his answer.

A. I told them of my own free will.

Q. Did you tell Mr. Milano, myself and Mr. Coghlan that when you were first talking to the police they told you that they didn't want to hear what you are telling them, that they wouldn't let you go until you signed that statement?

A. That's what I told you – all when you – all came out to my house.

Q. That's what you told us, right?

A. Yes.

* * *

[3893] Q. So after the cashing of the checks and giving the money to your sister, Gail Toney, did you do anything else for your sister, Gail Toney?

A. I don't know. I might have went to a store or something like that.

Q. I understand. But in conjunction with this case?

A. Oh, no.

Q. Were you present, sir, when a check was given to Denise Fugate?

A. Yes.

Q. Did you participate in cashing that check?

A. Yes.

Q. Was that about the same time that you cashed these checks?

A. Yes.

Q. How is it that you got the – Denise got the check? Was it given to her in your presence?

A. Yes, I think so.

* * *

[4051] Q. What type of weapon did you receive?

A. A .38 caliber six-shot chrome-plated revolver, black rubber grips.

Q. Is there a type of .38 caliber noted there?

A. Nothing other than Smith and Wesson.

Q. Is there a serial number noted there for that weapon?

A. Yes, sir. Serial number is V as in Victor, 146630.

Q. Did you receive any type of ammunition in connection with that weapon?

A. Yes, sir. Five live .38 caliber rounds and one spent .38 caliber casing.

Q. Now, was that weapon ever returned to Mr. O'Neal?

A. Yes, it was, sir.

Q. And what page are you looking at when you read off when it was returned?

A. Page 255.

Q. What does it state on that page in connection with the date of this item being returned to Mr. O'Neal?

A. It states, "Returned to owner after case was nolled by Mr. Robert O'Neal, 1-6-81."

Signed by Mr. O'Neal with an address of 12203 Chesterfield.

* * *

VOLUME 13

[4446] BY MR. CORRIGAN:

Q. Tell us, Officer, everything that Mr. Lloyd Allen said to you and everything you said to him in the early morning hours of March 26, 1981, in the oral interrogation.

A. During our oral interrogation of Mr. Allen we advised him of the fact that we had knowledge that Mr. Podborny was dropped off on the evening of January 29th at that location, at 11023 Superior. He told us at that time that he was at the building when Mr. Podborny came in, he said, in company with him was Robert O'Neal and another black male unknown to him.

He stated that when Mr. Podborny walked in the door that day, grabbed him and this black male tied him up, this unknown male, tied him up with some wire.

He stated that the man took Mr. Podborny's property, which consisted of a wallet, papers, and gave them to this O'Neal. He said that Mr. O'Neal left the building, moments later he left the building.

He went out, met in a car with Mr. O'Neal and Ms. Toney and told Ms. Toney that he had to hit Mr. O'Neal with a pipe in the legs to keep him from moving.

THE COURT: Mr. Who had to do what?

[4447] THE WITNESS: Mr. Podborny, to keep him from moving.

At that time they were taken to a bar to receive some cash from Ms. Toney from Mr. Podborny's property and they went to Dearing's Bar, I believe, and they had a few drinks.

I presented the crowbar to him and asked him if this was the actual metal pipe that he used to strike Mr. Podborny in the legs. And he stated that he really didn't strike him, or hit him, he just told Ms. Toney that.

I interviewed him as far as – relative to the tapes of the conversation I overheard between Gail Toney and himself. And I told him that "You were talking in a code. You were talking about the taxes and the pages."

I said, "What kind of code was that?"

He stated that he knew it was – something was up, that after the first conversation, after the first phone call

when Gail Toney called him and stated to him that she had a doctor that was willing –

* * *

[4458] THE WITNESS: Date, March 26th, 1981, time: 0700 hours. The following is a statement of Lloyd Gerald Allen, colored male, 29, single, 10501 Wade Avenue, dob 7-9-51, telephone 341-4268, social security number 287-52-4537, employed at Black and White Vending Company at 10023 Superior Avenue.

"Lloyd Gerald Allen, you may be charged with kidnapping and/or conspiracy to commit aggravated murder. Before making any statement that may be used against you at the time of your trial, we wish to repeat the instructions issued prior to oral interrogation, that you have the right to counsel, appointed or retained, before interrogation, that you have the right to remain silent, and that anything you say may be used against you. You have the right to an attorney present while making the statement.

"Question: Now, do you understand this?

"Answer: Yes.

"Question: Do you care to make a statement?

[4459] "Yes.

"Signature, Lloyd G. Allen.

"Lloyd Gerald Allen: Back in January, Gail Toney, Robert O'Neal and a dude named Sonny got together and planned to take a man and hold him. Mrs. Toney asked me to hold a man for a couple of weeks. I said no. This was at O'Neal's place on East 111th and

Superior. Mrs. Toney, me, Mr. S wanted me to do it. It was like he was a big man or something. They got someone I didn't know to come in. I don't know who he was. I ain't never seen him before. I know everybody that comes up and down Superior. Mrs. Toney told me to be in the shop the same evening.

"At about 9:30 P.M., the same night I was at O'Neal's place on Superior. I was there with Bob O'Neal and the black guy I didn't know. The other guy kept walking around saying 'they're late . . . they're late.' He acted scared and nervous. Bob was walking around not saying much. He was nervous too. I was standing by the front door outside and I saw Gail coming down Superior in a tannish colored station wagon. She made a U-turn at the curb right in front of the gate. The girl I was talking to left and I walked back [4460] inside. I was right inside by the door.

"Henry Podborny pushed open the door and shot straight in and asked, 'Where's Dimples?' I saw the guy grab him and they tussled. I was standing by the door. The guy said, 'I got him now.' Then Mr. O'Neal said, 'Give me the stuff.' The other guy gave Bob Hank's keys, checkbooks, and his wallet. He put these things in a rag and gave them to Bob. Hank was laying on the floor by the bar all tied up. Bob left with the stuff and went to Gail's car. I ran out the door and locked it. I went around to Gail's car and Bob and Gail were together. Gail took Bob and me to Dearing's and dropped us off.

"Later Mrs. Toney called Dearing's and told me to go back and see if anything was on the floor. I went back and Hank was gone and the gate was open. Bob stayed in the

restaurant. He was nervous as all outdoors. I left then and got with Jill.

"Question: When Henry Podborny came to the restaurant that night in January who was there?

"Answer: Three. Bob O'Neal, the dude I didn't know and me. And then Gail brought Hank.

[4461] "Question: Where is Henry Podborny now?

"Answer: I don't know.

"Question: Were you armed with any weapons when Henry Podborny arrived?

"Answer: No.

"Question: Did you receive any money from Gail or Bob that night?

"Answer: No.

"Question: Is there anything else you would like to add to this statement?

"Answer: No.

"Question: Have you read the above statement and is it the truth?

"Answer: Yes.

"Question: Signed Lloyd G. Allen, witness James Simone, No. 387, Detective, witness Timothy Patton, Detective, No 1211, by: Simone, No. 387, time completed: 0730 hours, 3-26-81."

BY MR. CORRIGAN:

Q. That which you have just read, Officer, States Exhibit No. 93, came after an oral conversation between yourself and Lloyd Allen?

A. Yes, sir.

* * *

[4464] I asked him if he understood his rights and he stated he did. And he wanted to talk to us about it.

He wanted to know what this was all about.

Q. And is Mr. O'Neal in Court this morning?

A. Yes, sir.

Q. Would you point him out for purposes of the record, please?

A. He is the second man at the table with the blue suit and the dark tie.

Q. And after advising Mr. O'Neal of his constitutional rights, did you have conversation with Robert O'Neal?

A. Yes, sir.

Q. Would you tell us everything you said, everything that Mr. O'Neal said, the early morning hours of March 26th, 1981?

A. We told him what we were there for, what we were asking about in connection with Henry Podborny. We told him we had received certain information that he was present when Mr. Podborny was brought to 11023 Superior.

Mr. O'Neal told us that indeed he was present. He was there with Lloyd Allen and an unknown black male to him, that he was unknown to him. That she was [4465] sitting outside, Gail Toney.

He said when Mr. Podborny arrived in the late evening of January 29th, that Allen and this man grabbed Mr. Podborny, tussled him to the floor. They got his property from him, gave it to him. He in turn went and gave it to Gail Toney, who was out in the car. And she gave him $40, or $60 of cash that was in there. And he went and O'Neal came out then laughing, saying he hit –

Q. I'm sorry. Who came out?

A. Allen came out of 11023 Superior to the car where they were at, saying that he hit Mr. Podborny with the pipe in the leg. Mrs. Toney dropped them off at Dearing's.

We had told him that this conspiracy for this man to grab him started before and he told us that it was arranged through him and Mrs. Toney, that he was to get $6,000 for holding Hank there while they went to Chicago to get his property.

Q. Did he say anything else to you at that time?

A. No.

* * *

[4840] Q. Did there come a time, Bob, when you received any money from Gail Toney?

A. Well, the only money I received from Mrs. Toney was $6,500 from Mrs. Toney.

Q. Okay.

A. It wasn't a receiving, it was an investment.

Q. Tell us how it came about that you got this money.

First of all, was it in cash or check form?

A. It was a check.

Q. And do you remember when it was that you got this money from her?

* * *

[4845] A. I had a little problem in East Cleveland with Judge DeVinne to get the firearm back.

He threw it out of Court.

Q. Without getting into the detail of this case –

A. Do I explain the whole thing?

Q. No. Without getting into the details of that case.

I take it there was something that happened in East Cleveland, right?

A. Yes.

Q. You were charged with something?

A. I was charged, yes, sir.

Q. As a result of that you retained, an attorney?

A. Yes, sir.

Q. And what did you do with that check?

A. I paid an attorney with it.

Q. All right.

As a result of that case in East Cleveland did you come to get a gun back?

A. Yes, I did.

Q. And what kind of a gun was that?

A. A .38.

* * *

[4848] Q. Mr. O'Neal, do you recall certain testimony in this case with respect to an occasion where I believe you were over Gail Toney's residence and you, at sometime in January, you talked to Dimple Podborny and you talked to Gail Toney?

Do you remember that testimony?

A. Yes, sir.

Q. Now, tell the ladies and gentlemen of the jury what happened at that particular time.

A. Well, I was over Mrs. Toney's house. As a matter of fact, I stopped over several occasions to drop her off papers and stuff because she had a young kid and she wasn't able to come over and pick them . . .

* * *

[4863] Q. What about the other guys?

A. They were animals, no offense, the police department, because some very nice people in this department. Detective Patton, he was one. The other staff, more or less, kicked me around.

* * *

[4864] Q. And like good detectives that were using a Mutt and Jeff style one day, one as a bad guy and Mr. Pattonas the nice guy?

* * *

Q. That's what happens in the real world, right?

A. Yes, sir.

Q. Now you heard testimony about certain oral statements people claim you have made.

You heard Detective Patton testify, haven't you?

A. Yes, sir.

Q. Did you tell Detective Patton those things he testified to?

A. No, I didn't tell him, he was telling me.

Q. When Detective Patton was talking, did he have anything in his hands, or anything like that?

A. Yes. He had a statement, Gail Toney's, about that long (indicating), flashing in his hand. He said, "Look see." He said, "Where is the body?"

* * *

[4872] Q. That was the same time of the beating that you had gone through, or similar, that you wanted him to tell you similar about where the body –

A. They didn't beat me like that.

Q. They pushed you?

A. They just yelled and pushed me around.

Q. They looked – knocked you against the wall and said where is the body?

A. They didn't knock me against the wall. They was questioning me and pushing me around, but they didn't put their hands on me bodily.

* * *

VOLUME 14

[4885] Q. What were you trying to buy?

A. Purchase a license.

Q. From the guy at the lounge?

A. From the guy at the lounge.

Q. And this investment that Gail Toney gave you was in the amount of $6,500; is that correct?

A. That's correct.

Q. And does her name appear on any document to your knowledge as to an investor in the bar liquor license?

A. No.

Q. She would be somewhat like a silent partner in this venture?

A. I think the name may be on – let's see. Something in that order, sir.

Q. You've got those documents?

A. Pardon me?

Q. You've got those documents?

A. No, I don't have them.

I didn't say her name was on the document, nor her name didn't appear on any of those documents.

Q. It does not?

A. No.

Q. But she gave you that $6,500; is that correct?

A. She didn't give it to me.

Q. What did she do?

[4886] A. It was an investment.

Q. Oh, she loaned it to you?

A. It was an investment, yes.

Q. Do you have a note signed?

A. It was a check.

Q. Do you have a note signed saying that you –

A. No, I don't have it.

* * *

[4892] Q. And Wilbur Higgins is not an individual that you would classify as one of your family, is he?

A. That's right.

Q. And you did in fact ask Jannie Morton to bring Wilbur Higgins up to see you; is that correct?

A. Yes, I did.

Q. And you claim that is business; is that correct?

A. Exactly.

Q. And Wilbur Higgins says what that business is; is that correct?

MR. D'ANGELO: Objection.

THE WITNESS: Wilbur Higgins lied.

Q. Wilbur Higgins said you weren't talking about no jukeboxes; do you remember that?

MR. D'ANGELO: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, I remember that.

Q. Wilbur Higgins told us you told him to go out and cover up the body, that's the body you and Lloyd killed?

A. Wilbur Higgins lied.

Q. He lied?

* * *

[4917] Q. You weren't yelling hey, Wilbur, get out there and cover the body in the field, fix our cheap spot?

A. I ain't told Wilbur nothing.

Q. Wilbur is lying; is that right?

A. Yes, he is lying.

Q. Detective Patton is lying?

A. I'm not going to call him a liar. If he said that, Wilbur is lying.

Q. He said that you said Gail Toney brought Henry Podborny to your bar, that makes him a liar, doesn't it?

A. It makes the statement a liar.

* * *

[4926] A. That statement lied. That statement is a lie he wrote.

Q. Mr. Lloyd Allen?

A. The statement he wrote is a lie.

Q. Is Mr. Lloyd Allen lying when he tells Detective Patton –

A. The statement he wrote is a damn lie.

Q. Excuse me.

Is Mr. Lloyd Allen lying when he told Detective Patton that you and he were in your bar the night Henry Podborn [sic] was brought?

A. The statement he wrote was a liar.

Q. Is Mr. Lloyd Allen lying when he told Detective Patton that you and he were in your bar the night that Henry Podborny was brought to you by Gail Toney?

MR. D'ANGELO: Objection.

THE COURT: Overruled.

THE WITNESS: The statement he wrote was a damn liar.

* * *

VOLUME 15

[5760] We then had the testimony of Christian Wag. Christian Wag testified in essence that he was the escrow agent for Robert O'Neal. That he was attempting to negotiate the purchase of a liquor license out of the Gaiety Lounge, that he received $6500. I think the term was good money, either a cashier's check, or a certified check. That he held that certified check, or cashier's check, $6500, until sometime, if I recall his testimony, to October 20th, or shortly thereafter where he gave the money back over to Mr. O'Neal. You now know the money ultimately was given to Mr. O'Neal as the result of his little problem in East Cleveland, which was ultimately turned over for his representation as it relates to this.

* * *

VOLUME 16

[5803] After Detective Patton's testimony, we then got into the defendant's case, if you recall. Robert O'Neal took the stand. You must assess his credibility as you assessed the credibility of any other witness. Robert O'Neal made reference to some trouble in East Cleveland,

tried to deceive you, ladies and gentlemen, that it was something to do with the registration. We now know –

MR. D'ANGELO: Objection.

THE COURT: Overruled.

MR. CORRIGAN: We now know it resulted in the death of Calvin Hines. He specifically was asked the question "Mr. O'Neal, isn't it a fact that you made a statement to Sergeant Deardon of East Cleveland that you, sir, said something to the extent he pulled a gun on me, so I shot him?" On this witness stand he said he didn't pull the trigger, or on this witness stand he said he hit him with the gun, but didn't shoot him.

You heard the testimony of Sergeant Horwitz, which boldly show you that this man stood right in front of you and lied. He also [5804] said that this man, Detective Patton, never advised him of his rights. Look at that piece of testimony and contrast it with all of the other witnesses, Gail Toney, James McLean, Leland Waress, Dimple Podborny herself, who indicated yes, he advised me of my constitutional rights, and decide whether or not O'Neal is telling the truth, or lying to all of you. I think your conclusion will obviously be that this man over here is lying to you.

We then had the testimony of L. Allen. L. Allen got on the stand, said he was beaten, notwithstanding the testimony of Dr. Paley, notwithstanding the photograph, State's Exhibit 98 I believe, notwithstanding the testimony of his former attorney, Patrick D'Angelo who indicated sometime in March he saw him with a severed lip,

notwithstanding the comment by Robert O'Neal indicating his lip was cut, hanging down. You look at that photograph. You make a determination whether or not Mr. Allen was beaten or not. You can conclude only but one thing, this man over here lied, Allen lied, he is a liar.

MR. ATKIN: Objection.

THE COURT: Overruled.

* * *

[5809] Ladies and gentlemen, as it relates to Mr. O'Neal, Mr. O'Neal talked to you about a little problem in East Cleveland, which in all actuality was the killing of another human being, where he killed Calvin Hines. The defense brought up this little problem in East Cleveland. The State of Ohio did not. We know from the [5810] evidence that a gun, a .38 caliber Smith & Wesson was turned over to this guy on January 6, 1981. We know that that's consistent with the pellet that caused the death in addition to the bludgeoning of Henry Podborny.

The pellet was removed by the coroner's office. It is consistent with the .38 caliber Smith & Wesson.

We place a .38 caliber Smith & Wesson in this guy's hand on January 6, 1981. Mr. O'Neal wants you to believe he knew nothing about it, Henry Podborny, yet based on the evidence, bludgeoned to death and shot to death, it was in his establishment. You will have the opportunity to look at these exhibits.

* * *

[5812] In his statement O'Neal admits to participation in the kidnapping. You recall the testimony of Detective

Patton, he, like the other people in this case, admit to a little bit, but then try to remove themselves from the aggravated murder aspect, which doesn't cut it, based on the law of the State, and the court will tell you the law as it relates to conspiracy and aiding and abetting and the participation in any particular part of the course of a criminal conduct makes you responsible for the totality of the crimes that are before you.

* * *

[5832] There has been mention about certain money which Mr. O'Neal supposedly received in this case. There is no question that he received a check for $6,500, but the prosecutor wants you to believe that that $6,500 was partial payment for his performance in this case. And I ask you [5833] to consider whether or not a person who is going to kill someone is going to take a certified bank check where it can be traced directly to him, his payment to kill someone, and then go ahead and do it? If you believe that, ladies and gentlemen, that's your prerogative. I suggest to you that the purpose of that $6,500 was just as Gail Toney testified.

She didn't say that was part of the hit money. She told you that was for the liquor license. And if you look at what Mr. O'Neal did, he gave it to an attorney. He attempted to purchase a liquor license until there was a problem in East Cleveland where he needed his money, which brings us to another part in this trial of certain other misrepresentations to you.

The prosecutor deemed it appropriate to call this detective from East Cleveland to show Mr. O'Neal received a .38 caliber Smith & Wesson gun on January 6,

1981. And he left it at that. Whether Mr. O'Neal took the stand to testify as to the facts surrounding that incident, he was limited by laws to what he can say.

* * *

[5838] Gail Toney, her brother, Gary Gabbard and Waress, they met. They discussed violence and it pertained to Henry Podborny. Lee Waress testified that Gary Gabbord says that man don't talk.

Dimple Podborny wasn't at that meeting. Lloyd Allen wasn't at that meeting. Robert O'Neal wasn't at that meeting. Do you have two assassinations discussed in this case?

All of a sudden, Gabbard and Waress and whoever else must be involved, which we have no way of knowing, all of sudden they bail out. And Lloyd Allen and Bob O'Neal pick up from there. Bob O'Neal because he is going to get $400 and then another $100, another $400. He only gets $300 because Gail Toney is keeping $100 for him. This man is going to kill a person in his own place with evidence in his own place and then drop the body off in a field next to the building he owns, stay out on the street for two months, knowing, as suggested, that he has organized crime and the Danny Green, and all those people he knows, he is going to leave the [5839] body in the field for two months and not do anything? And then when the body is discovered, or before then, he is going to have a Wilbur Higgins type move the body, this man who is supposedly a street person, is going to tell Wilbur Higgins to move the body, or do something, don't even move it, just cover it up. That's the reasonable testimony you heard in this particular case, folks.

Ask yourselves why did Lee Waress get so upset because he didn't get his $30,000. Does a person become so upset that he arms himself with a gun and goes looking for people because he had three meetings and because of those three meetings he is entitled to his $30,000? No cocaine dealer, no big drug people with a lot of people involved, you just to go a lot of meetings and get a lot of money. This man just talked. He engaged in conversation. And he wasn't the type of person to kill because he withdrew from the conspiracy and in the interest of justice, these people only let him plea to kidnapping because he was so essential to the State in this case. He was very important in their breaking their case, Lee Waress.

[5840] He was so important that he wasn't even talked to when he was in the County Jail. He was so important that Detective Patton respected his wishes. Would you care to talk to us now, I have an attorney, Bill Summers, end of conversation. No oral statement, no confrontation, no nothing, but Dimple Podborny, the millionaire's wife, that's up in Chicago, who seemingly would have an attorney there too, no problem about going up there where he is, in her hospital bed, and put words in her mouth, but forget about Lee Waress, forget about this man who wants his $30,000 for nothing.

Ladies and gentlemen, you heard the testimony in this case from James McLean about what happened on the 29th. And you heard testimony that immediately before the 29th, I believe one or two days before the 29th of January, Gail Toney called McLean and told McLean what was going to happen, we are going to grab Henry,

me and my brother. That's what she told him two days before it actually took place.

She had access to O'Neal's place. And whatever significance it is that O'Neal has the – I don't know what to call it – he had sex with [5841] this woman, for however long he should be convicted for that, I would admit, but this woman, Gail Toney, she worked for him. She had access to his place. She knew, as Lee Waress testified, that they can take him to O'Neal's place. That there is someplace downstairs with a door that has bars on it that he could be locked in.

She knew about that. She knew if Mr. O'Neal was – Mr. Podborny was done harm over at McLean's place, how would it trace back to her. She told McLean that her and her brother would do something.

What happens the night of the 29th right after Mr. Podborny is done in? It is no question, I don't care if you can show that pool table covering is from O'Neal's pool table, there is no question in my mind that Mr. Podborny was killed at that location. There is no question about that. No. No one is trying to play games, but you can't deny the blood on all of those things. The man was killed there. He was bludgeoned. He was shot there.

There is also no doubt that Gail Toney immediately after this poor man was shot and bludgeoned that she runs to meet McLean. She [5842] comes down to Captain Frank's and makes a phone call from a pay phone saying I got the keys. When she meets him what does she do? She gives this fine shyster a dead man's driver's license and an American Express Card and traveling checks.

Now, Mr. McLean wants you to believe he doesn't know anything. He doesn't know Mr. Podborny is dead. All of a sudden this man got a man's driver's license, American Express Card and traveling checks and Gail Toney told him at that point in time when she met him at the Holiday Inn parking lot out in Richfield, that me and my brother grabbed Henry, we tied him up, we grabbed him.

* * *

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[6075] Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable. That's incorrect.

MR. COGHLIN: Objection.

THE COURT: Overruled.

MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused [6076] of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

MR. MILANO: Objection. It is a misstatement of the law, sir.

THE COURT: Overruled.

MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it.

MR. COGHLIN: Objection, Your Honor.

THE COURT: Overruled. I would indicate the first case will not be mentioned in this closing argument.

* * *

[6084] MR. MARINO: First counsel for Mr. O'Neal asked you to ask me some questions about why things did or did not occur and I can answer one of them right now. And it galls me. Why didn't we take the pellet from the head of Calvin .38 Special five grooves to the right, copper jacketed pellet, compare it with [6085] the same bullet, the same type that killed Henry Podborny. Well, you know we had Elmer Ruple subpoenaed and every defense attorney here objected to bringing that man here.

MR. MILANO: Objection.

THE COURT: Overruled.

MR. MARINO: And they argue to you now why didn't we bring that person here. They bring that up now when they know we tried to bring him in.

MR. D'ANGELO: Objection, Your Honor.

THE COURT: Overruled.

MR. MARINO: You take some of the words used by counsel for Mrs. Podborny and apply it to that

incident. That language, by the way, if you think was bad when he was sitting here, you should have been sitting there and standing here during the trial and it is not said just about me. That is not the way to conduct, I think, a $250,000 defense. They are grabbing at straws trying to save the principals, knowing that the aiders and abettors have already been convicted, that is reprehensible.

[6086] MR. COGHLIN: Objection.

THE COURT: Overruled.

MR. MARINO: I even recall counsel for Mr. Allen bringing up this idea of gun registration again. Now, you know I want to take you back to that point alone. To review the course of conduct at that stage of the trial. The officer who we had take the stand just to come in and tell you that we know Robert O'Neal had a Smith & Wesson .38 caliber pistol, at one time given back to him on January 6th of 1981. And O'Neal - excuse me - yes, O'Neal takes the stand and says, "Well, that was a small problem in East Cleveland." And when we started to get into it, the best $250,000 piece of advice I ever heard was when I was examining Mr. O'Neal and counsel for Mr. O'Neal stood up and said, "Keep your mouth shut." That's good advice. If they all had kept their mouths shut, they might not have been in this position.

MR. COGHLIN: Objection.

THE COURT: Overruled.

MR. MARINO: But then counsel for Mr. Allen went on to embellish them and he says, "Well, is the gun registration straight, [6087] when the gun is confiscated and they take that gun and fire a gun because they had

told you the gun was not only returned to him, but five live rounds and one spent pellet was returned to him, now that is a bit much to take in. They were misleading you on that point. Then O'Neal says, "I would be crazy to shoot a man with a registered gun." Why does it make you sane if you kill without a registered gun, is that the standard of sanity?

We showed you evidence that the killer who pulled the trigger lied. And he lied about a very important matter. He not only lied about being crazy about killing a man with a registered gun, counsel misled you, he further lied about how it occurred. "I hit him on the head and the gun went off." You show me one gun that is fired by hitting someone with the gun. You have to pull the trigger. He is going to complain it is a defective gun. Where is that gun? That's how we will make an accurate comparison of those pellets.

And Officer Dearden did take the stand and testify - his sergeant did. Are we calling him a liar, too? We gave O'Neal a fair chance to [6088] say whether or not he ever made the statement, "That guy pulled a gun on me so I shot him." Denied it. Tried to make himself look innocent, tried to make himself look like a peaceful law abiding citizen. Which of you could shoot me first if I pulled a gun on you?

MR. D'ANGELO: Objection.

THE COURT: Overruled.

MR. MARINO: I also wonder about those situations. A guy pulled a gun on me so I shot him. Great.

* * *

[6094] . . . . Basically, he is the one that those two individuals met with and talked about different schemes to get Henry Podborny to come to Cleveland. Again, he is not the type of individual you are going to ask home to dinner, but he is the type of individual these people would involve in a murder. That's not our fault. That's their fault.

Mr. Waress completed one portion of what this case is about. He talked about a criminal act, he conspired, he sat down with other people and talked about vile criminal acts and how it could be perpetrated. If he had done further and gone to Chicago as Gary Gabbard did to get the fruits of the crime, or if he had gone farther like these people had and committed a violent act, or if he was the one to pay people for this like Dimple Podborny did, then he would be guilty of each and every crime alleged in the indictment.

Because he stopped now, you are going to say he stopped because he got caught, or because he didn't want to get involved, or because they cut him out, whatever the reason is, the fact [6095] in this case shows that he cut himself out. We even brought out that he admitted, sure, I would have taken that money if I could have gotten it. Now, they cut him off. The law didn't say you get points, or you lose points because you could have done something, it says if you conspire and take one step further and act, you not only are guilty of conspiracy, but each and every crime that follows from that conspiracy, whether or not you intended –

MR. MILANO: Objection, sir, to the law.

THE COURT: Sustained as to the law. I will give you the law.

* * *

[6104] They tried to tell you, and I think it should have stood out in the case, that when Mary Ann Zablocki testified the situation, much like the little problem in East Cleveland when they tried to group the situation, developed that I believe it was Mr. Milano's cross-examination, and they were trying to explain how Mrs. Zablocki – or Miss Zablocki heard the phrase the body is in the field somewhere. . . .

* * *

[6120] And I ask you to look at these facts reasonably as your fellow jurors have done with common sense and without any sympathy. That's the one thing that we fear in this case, it's sympathy. I know she is 60 years old. She is going to live a lot longer than Henry Podborny. She's got a heart problem and Henry's got a head problem.

You go back there and you want to consider how bad this act was, you pick up that crowbar and say that has no evidence on this, of course it doesn't have evidence on it. . . .

* * *

[6121] And as far as the crowbar, you pick that crowbar up, you get the dirt on your hands, you tell me about it. There is nothing on that crowbar, but when you get back there, think about what it might be like, first of all, to sit down and talk about kidnapping another human being. Get into the case. You are going to have his clothes back there. Grab those things, they stink, they've got

blood on them. Wrap [6122] yourself in that blanket and see what the victim of a murder is like.

MR. D'ANGELO: Objection.

THE COURT: Overruled.

MR. MARINO: Put a sheet over you, put the plastic over you. I tell you this now because this is what the case is all about.

THE COURT: Hold it a minute.

(Thereupon, the Court whispered the following into the court reporter's ear out of the hearing of the jury.)

THE COURT: The Court at this point is going to indicate that the defense attorneys have systematically interrupted throughout the train of the plaintiff's – or rather of the prosecutor's. This is exhibited by anybody who would look at this record. The man has talked within the record more than anybody who has addressed this jury. He has stayed with the record and please, if you can't give a legitimate objection, hold your peace and let the man finish.

MR. D'ANGELO: Objection.

THE COURT: Done alternatively [6123] too, put that on there.

(Thereupon, the following proceedings were had in open court in the presence and hearing of the jury.)

MR. MARINO: As I said, I asked you to do this, to get into the case, to really handle this case. You can always wash up later, folks. To find out how seedy an act is, to grab a man and murder him, pick up that tire iron

and ask yourselves to really take that iron yourself and hit somebody in the head five times, could you do that? Who could but a murderer. Who could but a man who would never – he would be crazy to kill someone with a registered gun.

* * *

[6152] You are instructed, ladies and gentlemen, that the testimony is not used to supplant but rather supplement your judgment. Now, ladies and gentlemen, the testimony has been introduced that expert witnesses and co-conspirators and co-defendants, to wit, Leland Waress, Lola Gail Toney and Mark Gabbard and McNeal –

MR. MARINO: McLean.

THE COURT: McLean, rather, not McNeal, it is O'Neal, rather, it is McLean who I meant, has been convicted of previous acts, previous criminal acts in the past. The testimony relating to these previous convictions may be considered for the purpose of helping you test the credibility or weight to be given the testimony of such witnesses.

The testimony relating to previous convictions cannot be considered for any other [6153] purpose.

Now, the Court would indicate that one who testifies on the basis of a direct or implied promise from the prosecution, that he will be dealt with in a preferential limited fashion, is a competent witness. And the testimony of such witness may be received in evidence and considered by the jury. Such testimony should be examined closely and should be afforded such weight as you in applying the standard of credibility, which has been

previously told you, identified by me, that you believe such testimony is entitled, to such weight as it is entitled.

Other persons have – and another person, Lola Gail Toney, one O'Neal, Gary – not Gary Gabbard –

MR. COGHLAN: I believe the Court misspoke. I believe you mean McLean rather than O'Neal.

THE COURT: Again, thank you, Mr. Coghlan.

* * *

[6158] So we go to the first count. The Grand Jury returned an indictment under 2903.01(a), which statute reads: "No person shall purposely and with prior calculation and design cause the death of another."

The indictment was returned against the defendants under favor of that statute in the fact that they were alleged to have committed an aggravated murder of one Henry Podborny.

I will give the elements of aggravated murder. Once again aggravated murder is defined as follows: "No person shall purposely of a prior calculation or design cause the death of another."

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design. Before you can find the Defendants Robert O'Neal, Lloyd Allen, Dimple Podborny guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentlemen, that first that Henry Podborny was a living person and that his death was caused by the defendants or by a conspirator, co-conspirator or one aiding and abetting the defendants, the [6159] individuals charged in

this crime, those people charged in this crime. And that the death was caused in Cuyahoga County, Ohio, on or about the 29th day of January, 1981.

Secondly, that the killing was done purposely and, thirdly, that the killing was done with prior calculation and design and, fourthly, that the act was an unlawful done willfully.

I mentioned the word purposely. And the Court will indicate that the purpose is an element of each one of these three counts. And I'm going to give it a full explanation now and as we reach the other ones just indicate what purpose is, the other counts that is aggravated robbery and kidnapping.

Purpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent Henry Podborny.

The Court in order to assist you in [6160] understanding the meaning of purpose or purposeful herein would give you this kind of special – will give you this instruction. Wherein the evidence may disclose the existence of complicity by way of an aider or abettor or a conspiracy, the law of the State of Ohio is as follows: As stated in the leading case in the matter where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was

performed was reasonable or likely to produce the death of another, then each conspirator, or aider or abettor is equally guilty as the principal offender of the homicide.

Although such conspirator, or aider and abettor as a conspirator was neither present or had knowledge of the physical killing, or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain nature regardless of what the offender intended to accomplish. Therefore, if it is the specific intention and purpose to [6161] engage in an act of that nature, then the specific conduct or objective in producing a certain act results or engaged at the time specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is known only to him unless he expresses it to others either orally or indicates it, or by his conduct or indicates it through his conduct. Purpose with which a person does an act or brings about a certain result is determined from the manner in which it is done, the means used, or the weapon used, and any and all facts and circumstances in evidence.

Now, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life and to inflict great bodily harm, the purpose to, intent to kill may be inferred from the use of the weapon.

The Court has used the word deadly weapon. Deadly weapon is an object or instrument which is capable of inflicting death. And in determining whether or not a gun

or instrument was used in this particular case, you will consider [6162] the evidence and consider the nature of the instrument, its capability to inflict deadly harm and the manner which you find it was used in in [sic] this case from the evidence.

Now, ladies and gentlemen, proof of motive is not required in this case. The presence or absence of motive is one circumstance bearing upon the intent of purpose. The word unlawful in the statute means contrary to law.

Now, ladies and gentlemen, the Court will continue to define the various elements and I will define purpose again to robbery and kidnapping in a few moments. Being aggravated robbery and kidnapping, having the elements of purpose, now prior calculation and design is an essential element of the crime of aggravated murder.

Prior calculation and design means that the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reason must have included a little plan involving a steady consideration of the method, the means or the instrument which kills another or a weapon used to kill another.

[6163] No definite period of time must have elapsed, or no particular amount of consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment or after monetary consideration of the purpose to kill is not sufficient to constitute the crime of prior calculation and design – strike that. Constitute the crime prior calculation, or the prior calculation and design needed to meet the element required for aggravated murder.

If you find from the evidence that the defendant or the co-conspirators, co-conspirator, either individually or co-conspirators, or aider and abettor were actually performing the act to kill and this purpose was arrived at with prior calculation and design before he or she performed the act, that is sufficient for this element of the crime of aggravated murder.

Proximate cause is an essential element of the crime of aggravated murder. Proximate cause is an act which in a natural and continuous sequence produces the result and without which it would not have occurred, that is the death of Henry Podborny. Proximate cause exists when the death was a natural and probable result of the [6164] result of the act or acts. In this case the death of Henry Podborny must have been – pardon me, must be such as would naturally and logically and proximately result from the defendants, codefendants or aider and abettors as complicitor acts or these acts must have been such as would reasonably be anticipated by an ordinary prudent man as to likely result in death.

If you find the use of a deadly weapon or dangerous instrument, then use is another essential element of the crime of aggravated murder and aggravated robbery and kidnapping.

Therefore, the statements prove that the crime took place on or about the 29th day of January, 1981, here in Cuyahoga County, Ohio.

Now, ladies and gentlemen, to aggravated murder finally. If you find that the State of Ohio has proved beyond a reasonable doubt each and every essential element of the crime of aggravated murder under 2903.01(a)

as I just explained to you, your verdict must be guilty. And you must find the defendants guilty of aggravated murder. If on the other hand you find that the State has failed to prove any beyond a reasonable doubt each and every essential element [6165] of all of any one of the elements of the crime of aggravated murder then you must find the defendants not guilty of aggravated murder.

The Court would indicate at this time in this particular case we have multiple defendants. We have three. And we discussed separating the question of guilt or innocence with each one of these defendants. You must separately consider the elements applicable to each one of the defendants as he or she were separately tried and you must separate it in your finding, as I will explain, to each defendant. You must state your finding to each count separately, also, and to each defendant uninfluenced by the verdict as it relates to the other defendants.

The counts, three separate counts, have to be considered separately. The defendants, each and every one of them, may be found guilty, or not guilty as to any one or all of the charge set forth in the indictment.

Now, as to the second count, the second count termed under aggravated robbery and this is found under 2905.01, which reads as follows:

"No person in attempting or committing a theft offense as defined in Section 2913.01 of [6166] the Ohio Revised Code, or in fleeing immediately after such offense, or offenses, shall do either of the following –" And I have paraphrased this, either have a deadly weapon or dangerous ordnance as defined under 2923.11

on or about his person or under his control or in the alternative, inflict or attempt to inflict serious physical harm on another.

The elements briefly, from the definitions are that these defendants, or co-conspirators, or one which you find to be an aider and abettor, inflicts serious harm or attempts to inflict serious harm on another, or in the alternative that the defendant has a deadly weapon or dangerous ordnance on or about his person or under his control and that the defendant was either, in either case, was committing or attempting to commit a theft offense, or anything immediately thereafter of a felony, normally the Court would indicate that the defendants are charged with aggravated robbery.

And before you can find the defendants guilty, you must find beyond a reasonable doubt that on or about the 29th day of January, 1981, here in Cuyahoga County, that the defendants or an [6167] aider and abettor or co-conspirator, did obtain or attempt to obtain property of some value, however small, for the purpose of depriving Henry Podborny of that property and the defendant had a deadly weapon or dangerous ordnance on or about his or her person or under her control. Or in the alternative, you will consider the alternative of serious physical harm, that is the defendants inflicted serious harm upon the person of Henry Podborny.

Now, those are the elements of aggravated robbery conspired in this case.

Now, purpose again is an essential element of the crime of aggravated robbery. Purpose to deprive the owner of his property and to obtain the property is an

essential element of aggravated robbery. And once against a purposeful act, purposely is the specific intention to obtain certain results. And in this case it must be established at the time in question there was intent in the mind of the defendants and/or co-conspirators, or aides and abettors in complicity a specific contention to obtain the property of Henry Podborny.

Now to determine the purpose from which [6168] the person acts, does an act or brings about a specific result, is determined by the manner in which it is done, the means or weapon used and the weapon used and all other facts and circumstances in evidence. As to the issue – as to the issue, rather, of a deadly weapon or dangerous ordnance, a deadly weapon, I have explained it one way. There is another way to explain it.

Deadly weapon is an instrument, device or thing capable of inflicting death designed specifically, or especially adopted for use as a weapon or possessed or carried as a weapon. A deadly weapon is an object or instrument capable of inflicting death.

In determining whether or not a gun is an instrument or thing was used as a deadly weapon, you will consider the evidence, all of the evidence. The thing that is its nature, its capability, can be used a deadly weapon, and the manner you find it was used from the evidence, or threatened to be used from the evidence in this case.

Deadly weapon is an object or instrument also of such size and weight and of such design and shape that it may be grasped in the hand in [6169] such a way that it may be used upon or directed against thebody [sic] of

another in a manner with such force to injure or kill the other – another person.

It is a question of fact for you to determine whether or not objects, things, instruments claim to have been used in the evidence, was a deadly weapon, including the gun, and was used or threatened to be used in this particular case.

Now, a number of definitions, proof of fear or apprehension on the part of the person namely whom the weapon is used or threatened to be used, is not required.

As to the element of serious physical harm, which is alleged in the indictment as an alternative. Serious physical harm means by condition or such, or of such gravity as would normally require hospitalization, which involved acute pain of such duration as to result in substantial suffering or death.

The word attempt is used. Attempt is some statute purposely performed, which conduct if successful would constitute or result in the crime, the act or acts must be such as to identify [6170] the crime and to indicate its commencement, but is not necessary that the crime actually be completed. This is only as limited to the robbery statute. Aggravated robbery statute. Conduct constitutes an attempt where the acts are an immediate and substantial extent as to the execution of a criminal crime and of which will be completed but for an unexpected reason.

In conclusion, the Court would indicate to you as it relates to count number two, aggravated robbery. If you find that the State of Ohio has proven each and every essential element of the crime of aggravated robbery as

against the defendants, those who you find as co-conspirators, or aider and abettor, in that on January 29th, you found that they did unlawfully and purposely did in attempting to commit a theft offense as defined in 2913.01 and a theft offense, robbery is a theft offense, stealing is a theft offense.

In committing a theft offense, or in attempting to commit, fleeing thereafter, such offense upon Henry Podborny the defendants did have a deadly weapon or dangerous ordnance, to wit, a gun as alleged in the indictment, a gun on or about his person or under their control or [6171] if you find beyond a reasonable doubt in the alternative that on or about the 29th day of January, the defendants or co-conspirators or aiders and abettors or persons acting in concert with them unlawfully and purposely in attempting to commit a theft offense or in fleeing immediately after such attempt or offense upon Henry Podborny did inflict or attempt to inflict serious physical harm upon Henry Podborny then you should find the defendants guilty in the aggravated robbery, second count.

On the other hand, if you find the State of Ohio failed to prove any one of the elements beyond a reasonable doubt, any one of these elements that I have given to you, in the alternative form of aggravated robbery, failed to produce evidence that convinces you beyond a reasonable doubt of the indictment of the defendants or failed to prove any one of the essential elements of alternates that I have given to you, then you should find the defendants not guilty of aggravated robbery.

Now, the third count in this case involving kidnapping under 2905.01. And that statute reads as follows:

[6172] "No person by force, threat or deception or by any means shall remove another from the place where he is found, or restrain him of his liberty for any of the following purposes," and the purposes alleged in this statute that are alleged in the indictment are as follows: To facilitate the commission of any physical, any or, flight thereafter. That's under two of the statute.

Three, to terrorize or inflict serious harm on the victim or another. Therefore, you have these several elements as follows, to wit, one, that the defendant removes another, defendants, and when I say defendants I'm talking also about co-conspirators and aider and abettors, the defendants removed another from a place where he is found. And the defendants restrained another of his liberty and, two, that the means of removal or restraint is by either force, threat or deception. And, three, that the defendants purpose is to facilitate the commission of any felony or flight after the commission of a felony or in the alternative it is an either-or situation, again, is to terrorize the victim or to inflict serious physical harm to the victim.

[6173] That's the short form. I believe short-long all the way through here because that's the short form of what the State has to prove under the kidnapping statute before you can find the defendants herein, that is Gail Robert O'Neal, Lawrence O'Neal, Lloyd G. Allen, Dimple Podborny, guilty of kidnapping of Henry Podborny, you must find that beyond a reasonable doubt that on or about the 29th day of January, 1981, and in Cuyahoga

County, Ohio, that the defendant, co-defendants, conspirators, rather aider and abettors, in complicity removed Henry Podborny from the place where he was found or restrained Henry Podborny of his liberty for the purpose of facilitating the commission of a felony or flight thereafter or in the alternative terrorize him or in the alternative to inflict serious physical harm on Henry Podborny and that such acts were accomplished by force, threat or deception.

* * *

[6207] THE COURT: I'm in receipt of a question. The question in substance is asked me, the question asked me is to read again aggravated murder. Specifically as signed by [6208] Amon Ray, "Can we please have a brief definition of the laws of aggravated murder?"

I'll give you the elements of the crime of aggravated murder.

Aggravated murder is defined under Section 2903.01 as follows:

"No person shall purposely with prior calculation and design cause the death of another."

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design.

Before you can find the defendants guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentlemen, that, first, that Henry Podborny was a living person, was a living person and that his death was caused by the defendants, or by a conspirator, or aider and abettor in complicity, that is the individuals charged with the crime, and that the death was caused

here in Cuyahoga County on or about the 29th day of January, 1981.

Second, that the killing was done purposely. And third, that the killing was done with prior calculation and design. Fourth, that [6209] the act was an unlawful act done willfully.

I make mention of the word purpose. Purpose to kill is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question, there was present in the minds of the defendants, the co-conspirator, or aider and abettor, in complicity, if you find such a specific intention to kill the decedent, Henry Podborny.

The Court in order to assist you understand the element of purpose and purposely herein, wherein the evidence discloses an existence of complicity by way of aider and abettor and conspiracy, the Court instructs you, as I stated in the law of Ohio as follows: When you have an unlawful act being contemplated in an original conspiracy such as a kidnapping, stealing and so forth, although not identical with or similar to criminal acts charged, if the defendants conspired to commit the unlawful act in the manner in which it was performed would reasonably and likely produce the death of another, then each conspirator is equally guilty as the [6210] principal offender of the homicide although such conspirator, or person, or defendant, aider and abettor was neither present or had knowledge of the physical killing or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain nature regardless of what the offender intends to accomplish thereby, if it is his specific – pardon me – if it is the specific intention and purpose to engage in the act of that nature and he has a conscious objective of producing a specific result, or engaging in the specific course of conduct, or specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is known only to himself unless he expresses it to others, either orally or indicates it by his conduct. The purpose with which a person does an act or brings about a certain result is determined by the manner in which it is done, the means used, or the weapon used and any and all facts and circumstances in evidence. Now, if a wound is inflicted on a [6211] person with a deadly weapon in the manner calculated to destroy life and inflict great bodily harm, the purpose and intent to kill may be inferred from the use of the weapon.

The Court has used the word deadly weapon. A deadly weapon is an object or instrument which is capable of inflicting death. And in determining whether or not a gun or instrument was used in this particular case, you will consider the evidence, consider the nature of the instrument, its capability to inflict deadly harm and the manner in which you find it is used from this evidence and in this case from all of the evidence.

Now, ladies and gentlemen, proof of motive is not required. The presence or absence of motive is one of the

circumstances bearing upon intent and purpose. The word unlawful as used in the statute means contrary to law.

Now, ladies and gentlemen, the Court will continue – I'll have to do it exactly the way I did it.

Ladies and gentlemen, the Court will continue this and I would indicate that I'm [6212] defining the element of aggravated robbery and kidnapping in a few minutes.

Purpose is also an element involved in aggravated robbery and kidnapping, so some of these instructions will be read for all crimes.

Now, as to the prior calculation and design, prior calculation and design is an essential element of the crime of aggravated murder. Prior calculation and design means the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reasoning must have included a mental plan involving steady consideration of the method the person or instrument in which to kill another or the weapon used to kill another. No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment, or after momentary consideration of purpose to kill is not sufficient to constitute the crime of prior – the element, rather, of the crime, the element of prior calculation and design, which is required for aggravated murder.

[6213] If you find from the evidence that the defendants and/or co-conspirators and/or aider and abettor, in complicity, actually formed the purpose to kill and that purpose was arrived at with a prior calculation and design before he or she performed the acts, that is sufficient for the element – for this element of the crime of aggravated murder.

Proximate cause is an essential element of the crime of aggravated murder. Proximate cause is an act which in the natural and continuous sequence produces the result and without which it would not have occurred, that is the death of Henry Podborny. Proximate cause exists when the death is the natural and probably [sic] effect of – or the result of the act or the defendant's actions.

In this cae [sic] the death of Henry Podborny must be such as it would naturally and logically and proximately result from the defendants, the co-conspirator, aider and abettor, in complicity acts, and that these acts had to be such that would be reasonably anticipated by an ordinary prudent man as to likely result in death, if you find it was the use of a deadly weapon, or an [6214] instrument was used in the evidence.

Venue is an essential element of the crime charged in the indictment. Therefore, the State must prove that the crime took place on or about the 29th day of January, 1981, in Cuyahoga County, Ohio.

Now, in conclusion, ladies and gentlemen, as to aggravated murder, if you find that the State has proven beyond a reasonable doubt each and every essential element of the crime of aggravated murder under 2903.01, as I just explained it to you, your verdict must be guilty as charged. If on the other hand you find the State has failed to prove beyond a reasonable doubt each and every

essential element of aggravated murder, that I have just explained to you, or failed to prove any one of these elements against these defendants, then you must find the defendants not guilty and return a verdict of not guilty of aggravated murder.

The Court at this time has repeated it verbatim from the charge that I have given you as it reflects. And have I answered your question?

Do you want to take the jury out [6215] again.

(Thereupon, the jury was excused to the jury deliberation room to resume their deliberating.)

(Thereupon, the jury was returned to the jury box and the following proceedings were had:)

THE COURT: The Court at this time is going to interrupt your deliberations for about an hour and a half. It is my understanding that matters – one definite personnel matter, which the Court feels mandates and militates the interruption of the jury deliberations. You are going to go downstairs with Helen DiSalvo and we will be coming for you to come back here at about an hour and a half from here, 4:30, it's about a little more than an hour and a half, it's ten to three. You are not to discuss the case among yourselves unless you are sitting deliberating in the jury room as a body. This includes while you are away, especially if anyone interferes with your services as a jury, kindly tell the Court about it to my bailiff and with that, [6216] Dan, you want to take them down.

(Thereupon, the jury was excused from deliberating until 4:30.)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44551

STATE OF OHIO, PLAINTIFF-APPELLEE, - VS - ROBERT O'NEAL, DEFENDANT-APPELLANT.	:	JOURNAL ENTRY and OPINION FEE & TAXES

DATE OF ANNOUNCEMENT OF DECISION: JUL. 25, 1985

CHARACTER OF PROCEEDING:	Criminal Appeal from the Common Pleas Court, Case No. CR-n63540
JUDGMENT:	Judgment affirmed.
DATE OF JOURNALIZATION:	Sep. 4, 1985
APPEARANCES: For Plaintiff-Appellee:	John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Ohio; Carmen M. Marino, Asst. Prosecuting Attorney The Justice Center, 1200 Ontario Cleveland, Ohio 44113

For Defendant-Appellant: Marillyn Fagan Damelio
The Marion Building,
Room 307
1276 West Third Street
Cleveland, Ohio 44113

O'NEILL, P.J.

The appellant, Robert O'Neal, was indicted for aggravated murder, aggravated robbery and kidnapping. He came on for trial with co-defendants, Lloyd Allen and Dimple Podborny. At the conclusion of the trial, the jury returned guilty verdicts on all charges, not only for this appellant but for his two co-defendants. The appellant was sentenced to life and two 7-25 years sentences. A timely notice of appeal was filed with this court.

The first assignment of error complains that the appellant was denied a fair trial and his right to trial by a jury drawn from a representative cross-section of the community. When the State used its peremptory challenges to remove prospective jurors on the sole ground of group racial bias. The appellant brings to our attention the fact that the State, in the exercise of its peremptory challenges, excused seven blacks from the jury.

During the voir dire process, counsel for the appellant joined in a motion for mistrial and called to the court's attention that, out of six peremptories that the State had exercised, four black persons had been excused (Tr. 1237, 1240). After a short informal discussion, the court overruled the motion.

The essential nature of a peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control.

Lewis v. U.S., 146 U.S. 370, 378. The peremptory challenge is frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. *Swain v. Alabama*, 380 U.S. 202, 221. In discussing the purpose and use of the peremptory challenge, the *Swain* court, at page 221, wrote "for the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is, in fact, partial, but whether one from a different group is less likely to be. It is well known that these factors are widely employed by both prosecutor and accused. Hence, veniremen are not always judged as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of negroes, in a particular case, is a denial of equal protection of law."

In concluding the discriminatory exclusion argument under peremptory challenges, the *Swain* court went on to hold "the presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not over-come and the prosecutor therefore subjected to examination by allegations that in the case at hand all negroes were removed from the jury or that they were removed because they were negroes." It is our conclusion that the expressions in the *Swain* case are totally applicable and dispositive of this assignment of error. The appellant agrees in his brief that the *Swain*

burden has proved insurmountable and that he would not be able to comply with that burden. However, appellant goes on to argue that the method in which the prosecutor exercised his peremptory challenges denied the appellant his state constitutional and sixth amendment right to trial by a jury drawn from a representative cross-section of the community. In furtherance of this assignment of error, the appellant calls our attention to Article 1, Sec. 5 and Sec. 10 of the Ohio Constitution. Section 5 provides that the right of a trial by jury shall be inviolate and Sec. 10 provides that the defendant was entitled to a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. Apparently, the appellant would have us rule that in any criminal case, in which the defendant is a black person, the only impartial jury before whom he might be tried must be composed of a black majority. We can think of no intelligent reason to make such an assumption. Each of the twelve members of the jury chosen in this case, during the voir dire proceeding and as a part of their oath, promised that they would faithfully and impartially discharge their duties as jurors. This action, on the part of the jurors, raises an inalterable fact rather than a presumption. In the case of *Taylor v. Louisiana*, 42 L. Ed 2d 690, the United States Supreme Court concluded that a state constitution and statute, which systematically excluded women from jury duty, was unconstitutional and in violation of the Sixth Amendment for the reason that such a jury was not drawn from a fair cross-section of the community. In *Taylor*, the Supreme Court (p. 703) made a statement rather applicable to the

case at hand. "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." No charge is raised in this case that the selection of prospective jurors involved any patent discrimination. This first assignment of error is overruled.

Assignment of error number four is that during the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why appellant's gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why appellant's gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.

Appellant's gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination of the appellant, in spite of his previous order, the court permitted the prosecutor to extensively cross-examine the appellant about the details surrounding the manslaughter case. The appellant contends that this amounted to a violation of the order in limine and was also erroneously the admission of evidence of other crimes, wrongs or acts.

During direct examination, the appellant raised the issue of the East Cleveland incident. As a part of his testimony, he testified that he had received $6500.00 to buy a liquor license and that that money was eventually

used to pay an attorney for a "little problem in East Cleveland with Judge Devinne to get the firearm back. He threw it out of court." He went on to testify that the gun which was returned to him was registered and that it was a crime in East Cleveland to have an unregistered gun. During examination by one of the other defense counsel, appellant stated that the gun had been taken from him on one day and returned the next day. The State argues that it was the appellant who opened the door on the East Cleveland incident and that it was deliberately done to convince the jury that the appellant had a gun but that the gun was registered and that he would be a fool to kill anybody with a registered gun. The State further points out that when the appellant testified that the gun was returned to him, on the day after which it was seized, he was lying. The State had absolute knowledge that the gun was seized on June 5, 1980 and returned to the appellant on January 6, 1981. When one considers the record, it is obvious that the State, in their active cross-examination as to the East Cleveland incident, was primarily attempting to attack the credibility of the defendant-appellant, rather than attempting to bring to the jury's attention other acts of the defendant. In their introduction of testimony, it was necessary that the State bring to the attention of the jury that the appellant, as to the East Cleveland incident, was released from any charges brought therein. Reason would say that such evidence would do nothing to prove the character of the appellant in order to show that he acted in conformity therewith. It is more plausible to assume that the prosecution was conducting a cross-examination on a relevant matter affecting credibility, the door to which had been actively

opened and pursued by the appellant himself. Accordingly, we find this assignment of error to be without merit.

The second assignment of error complains that the appellant was denied his constitutional right to a fair trial by the admission of gruesome, inflammatory photographs.

Initially, the appellant complains that the court erred in admitting, over objection, eighteen (18) photographs of the remains of the decedent taken by the coroner, and two (2) photographs depicting the decedent's remains located in a field. The court also, over objection, permitted the introduction as exhibits of the actual cloth and various coverings which were found on the body. The court also allowed, over objection, the admission of a portion of skin removed from the appellant's finger and produced at trial in a liquid in a brown bottle. There is no argument as to the relevancy of these exhibits, but rather an argument that the court should have excluded some of them because their probative value outweighed the danger of prejudice.

The mere fact that a photograph is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. Evidence had been presented that, when the decedent's body was found, he had been dead for some weeks. State's exhibits 1(A) through 1(Q), being photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin,

removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by the appellant, O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with the case. The prosecution argues that there was testimony that the decedent had been bludgeoned and shot and that perhaps this crow bar was used in that attack. We find this argument to be weak and conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

The third assignment of error complains that appellant was denied his right to a fair trial and his right to confront and cross-examine an adverse witness when the trial judge permitted an FBI agent to refuse to answer questions directed at him under cross-examination. Co-defendant, Dimple Podborney [sic], subpoenaed and

examined an FBI Agent, Graessle. The appellant attempted cross-examination of this witness, however, the witness refused to answer any questions and a United States Attorney explained to the court that the agent was not authorized to answer any questions posed by the appellant. In Volume 28 of the Code of Federal Regulations and especially at Sections 1621 et seq., a party desiring to secure information from an agent of the justice department may make application with the Attorney General of the United States, setting forth in said application the information which the party desires to elicit. It is then up to the justice department to decide whether such agent will be permitted to disclose the desired information. Further on under this chapter of the Federal Regulations, a procedure is set forth whereby a denial of such information may be administratively appealed. This appellant had made no such application to the Justice Department. The United States Supreme Court has considered this regulation in the case of the *United States of America ex rel Rodger Touhy* v. Ragen, 340 U.S. 462, and concluded that such regulation is valid. The regulation does not prohibit nor preclude the disclosure of information by a government agent but rather regulates it and with good reason.

> "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness indeed the necessity of centralizing determination *** is obvious." *United States of America* ex rel Rodger Touhy v. Ragan, 340 U.S. 462, 467.

In the case at hand, the appellant could have but did not subpoena the FBI Agent. The appellant could have but did not submit the required application to the Justice Department. The appellant could have but did not request a continuance of the trial so that he could pursue the application requirement. In the case of *United States* v. Marino (C.A.6, 1981), 658 F. 2d 1120, the court concluded that the question of whether the procedure set forth in the Code of Federal Regulations denies a defendant a Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied (p. 1125). Accordingly, we conclude that this assignment of error is without merit.

The fifth and sixth assignments of error complain that the appellant was denied a fair trial by the court's instructions on complicity and instructions on conspiracy when, in fact, the appellant was never charged with conspiracy.

During the conduct of the trial and especially during instructions, there were repeated references to and definitions made thereof in spite of the fact that the appellant was not charged with the statutory crimes of conspiracy and complicity. We have previously faced this same issue in the case of *State of Ohio v. Dimple Podborny,* (Cuyahoga County C.A. Case No. 44574) and *State of Ohio v. Lola Gail* Toney, (Cuyahoga County C.A. Case No. 44220). Our consensus in those two cases was that the State is not obliged to charge a defendant under R.C. 2923.01, where the substantive crime charged was committed as the result of a conspiracy. The conspiratorial conduct becomes the vehicle by which the crime is executed

thereby making all the co-conspirators liable for the substantive crime. In further support of our conclusion, we draw attention to the case of the *United States v. Hoffa* (C.A. 6), 349 F.2d 20. In Headnote 30 of that case, the Court of Appeals noted that "conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime."

Accordingly, we find that assignments of error number five and six are without merit and the judgment of the trial court is affirmed.

Judgment affirmed.

JOURNALIZED SEP. 4, 1985
GERALD E. FUERST, Clerk of Courts
By /s/ JAC Deputy

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

_/ STILLMAN, J., dissents. See Dissenting Opinion.

*/ DONOFRIO, J., concurs.

/s/ Joseph E. O'Neill
PRESIDING JUDGE

*/SITTING BY ASSIGNMENT: */JOSEPH O'NEILL

SAUL G. STILLMAN, Ret'd. J. of the Eight Appellate District.

JOSEPH DONOFRIO, J. of the Seventh Appellate District.

JOSEPH E. O'NEILL, J. of the Seventh Appellate District.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 44551

STATE OF OHIO Plaintiff-Appellee	:	
-vs-	:	DISSENTING
ROBERT O'NEAL Defendant-Appellant	:	OPINION

DATE: JUL 25, 1985
STILLMAN, J., DISSENTING:

For the reasons which I have indicated in my dissenting opinion in *State of Ohio vs. Dimple Podborny*, Court of Appeals Case No. 44574, I respectfully dissent in this case as well.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 44574

State of Ohio,
Plaintiff-Appellee

Vs.

DISSENTING OPINION

Dimple Podborny,
Defendant-Appellant

DATE: Jul 30, 1985

STILLMAN, J. DISSENTING:

I find it necessary, respectfully, to dissent from the majority in the light of *State v. Henry*, 4 O. St. 3d, 44 (1983) and the strict mandatory requirements of Criminal Rule 14 and R.C. 2945.20.

In *Henry*, the Supreme Court of Ohio declared that "where two or more persons are jointly indicted for aggravated murder, each of such persons shall be tried separately, unless the trial court orders a joint trial pursuant to the strict mandates set forth in Criminal Rule 14 and R.C. 2945.20."

Criminal Rule 14 recites in pertinent part:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown."

R. C. 2945.20 provides:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately. The court, for good cause shown on application therefore by the prosecuting attorney or one or more of the defendants, may order said defendants to be tried jointly."

The record does not indicate any compliance with the requirements of Criminal Rule 14 and R. C. 2945.20.

The defendants, Robert O'Neal and four others, Gary Gabbard, Lola Toney, Dimple Podborny and Lloyd Allen were tried for aggravated murder and other offenses arising from the death of Henry Podborny. O'Neal was tried jointly with Dimple Podborny and Lloyd Allen. The remaining defendants were tried together in a separate trial. Counsel for O'Neal moved for a separate trial on two occasions prior to trial. The motions were overruled. The Prosecuting Attorney filed no motion for a joint trial.

Much as I deplo e the necessity for retrials, I am persuaded by the language of the *Henry* case that separate trails of the indicted individuals in the Podborny cases are mandated.

The entry filed in *State v. O'Neal* on September 23, 1981 recites, "Hearing had on Motion for Separate Trials; Evidence taken; Motion Denied . . . "

Footnote 4 of the *Henry* opinion at page 46 declares that the defendants "did not bear the burden of requesting separate trials" and the court reached the conclusion that " . . . because neither the state nor appellee Henry applied and sought affirmative approval for a joint trial for good cause shown pursuant to Crime. R. 14 and R.C. 2945.20, we . . . remand the cause for a new trial wherein Long will be tried separately." Any effort to validate the

joint trials held here would require a gross distortion of the language in *State v. Henry*.

Moreover, the guilt by association inferences which are implicit in the Criminal Rule and Revised Code is reinforced dramatically by the manner in which this case was tried. The reference by the majority opinion to the character of two of the co-defendants as unworthy of trust underscores this consideration.

I also find merit in the eighth assignment of error which again demonstrates the validity of separate trial requirements in capital cases. If an individual defendant is to be convicted because of the mental state of co-defendants, the right to a fair trial and due process of law is seriously compromised.

For the reasons stated, I find that I cannot regard the failure of the prosecuting attorney to apply for a joint trial to be merely a procedural error. A capital case should be prosecuted in strict accordance with the applicable rules and the abuses concomitant with a joint trail were clearly evident in the case *sub judice*.

I, therefore, dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs. CASE NO. C-1-86-0976

TERRY MORRIS,

Respondent

NOTICE

Attached hereto is the Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on January 22, 1992. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to

Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs Case No. C-1-86-0976

TERRY MORRIS,

Respondent

REPORT AND RECOMMENDATION

Petitioner Robert O'Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, the return of writ, the parties' submissions of exhibits and supplemental briefs, as well as evidence and legal arguments presented during two hearings. (Docs. 1, 10, 12, 14, 20, 22, 24, 25, 31, 34, 38, 41, 47, 49, 57, 58, 59, 63, 65, 67).

Procedural Background

On March 27, 1981, O'Neal and five others were indicated by the Cuyahoga County, Ohio grand jury on one count of aggravated murder as defined in Ohio Rev. Code § 2903.01, one count of kidnapping as defined in Ohio Rev. Code § 2905.01, and one count of aggravated robbery as defined in Ohio Rev. Code § 2911.01. (Doc. 10, Ex. B). On July 17, 1981, in a separate trial, a jury found two defendants, Lola Gail Toney and Gary Gabbard, guilty as charged. *Id.*, Ex. E, p. 2; Tr. 1735; *see also Ohio v. Gabbard*, No. 44207, unreported slip op. (Ohio App. Oct. 25, 1984). Another co-defendant, Leland Waress, pleaded guilty to one count of conspiracy to commit kidnapping. (Doc. 10, Ex. E, p. 2; Tr. 5123).

From September 1, 1981 through October 10, 1981, O'Neal and two co-defendants, Lloyd Allen and Dimple Podborny, were tried before a jury. The jury found them guilty as charged in the indictments. The court sentenced O'Neal to a life term of imprisonment for aggravated murder, a seven (7) to twenty-five (25) year term for aggravated robbery, and a seven (7) to twenty-five (25) year term for kidnapping. *Id.*, Ex. A.

O'Neal pursued unsuccessful appeals in the Ohio Court of Appeals, Eighth Appellate District, and in the Ohio Supreme Court. (Doc. 10, pp. 2-4).

O'Neal then filed his pro se petition for a writ of habeas corpus in this Court raising eight grounds for relief. (Doc. 1). We appointed counsel from the Ohio Public Defender's Office to represent O'Neal. (Doc. 26).

O'Neal contends that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5). He claims that the prosecutor improperly exercised his peremptory challenges to excuse jurors solely on the basis of their race. (Doc. 31, pp. 9-21). He also argues that he was denied his rights under the fourteenth amendment when the Ohio Court of Appeals failed to address an issue he raised in his memorandum in support of his appeal. (Doc. 49, pp. 6-7, 9).

The majority of O'Neal's claims, however, concern his contention that he was denied his right to a fundamentally fair trial under the due process clause of the fourteenth amendment. O'Neal argues that the effect of five trial errors, when considered both alone and cumulatively, deprived him of a fair trial. These five alleged errors concern two claims of constitutionally defective jury instructions, denial of his rights under the confrontation clause of the sixth amendment, prosecutorial misconduct, and the prejudicial admission of inflammatory evidence. *Id.* at 8-9.

Factual Background

The charges against O'Neal arose from the events leading to and surrounding the death of Henry Podborny, the owner and manager of the West Point Pallet Company in Chicago, Illinois. On January 29, 1981, Mr. Podborny's estranged wife lured him from his home near Chicago, Illinois to Cleveland, Ohio by pretending she wanted to

resolve their marital difficulties. On April 24, 1981, his dead body was discovered in a field in Cleveland, Ohio.

The six individuals charged with the kidnapping, robbery, and murder of Mr. Podborny were O'Neal, the owner of an unlicensed saloon[1] in Cleveland; Lloyd Allen, O'Neal's employee and friend; Dimple Podborny, Mr. Podborny's wife; Lola Gail Toney, Mrs. Podborny's daughter-in-law by a prior marriage and O'Neal's friend, whom O'Neal had employed as a bookkeeper for a number of years in the past (Tr. 1749-50); Gary Gabbard, Toney's brother; and Leland Waress, an acquaintance of Mrs. Podborny. James McLean was also a member of the group involved in the plot against Mr. Podborny. McLean assisted law enforcement authorities in their investigation and testified at O'Neal's trial. He was not charged. (Tr. 3236).

The following facts are, in many respects, disputed. However, the version presented is supported by substantial evidence and is consistent with the jury's verdict. The events leading to the death of Mr. Podborny began in May 1980 when Mrs. Podborny asked her son's wife, Toney, if she knew anyone who could provide her with physical protection from Mr. Podborny. (Tr. 1762-63; 5349-50). Between 1969 and 1979, Mrs. Podborny's marriage to Mr. Podborny had been "perfect." (Tr. 5349). In 1980, however, the Podbornys experienced martial problems and separated. (Tr. 5350-51). In May 1980, Mrs.

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[1] During the evidentiary hearing the parties agreed that O'Neal's saloon, referred to in the record as a restaurant, a bar, a "cheap spot" or a "cheat spot," was an unlicensed saloon where liquor was sold after hours.

Podborny and her children from a prior marriage began receiving threats, apparently from individuals who were following the instructions of Mr. Podborny. (Tr. 5349). As a result of these threats, Mrs. Podborny informed Toney that she wanted to hire someone to protect her. (1762-63).

Toney then contacted McLean, whom she had met when she began working for O'Neal. (Tr. 1752). Toney and McLean devised a plan wherein she would introduce McLean to Mrs. Podborny as "Stan," a man with connections to organized crime, in order to convince Mrs. Podborny to pay $5,000 for physical protection. (Tr. 1768-76).

In June 1980, Toney and McLean met Mrs. Podborny and one of her daughters in Richfield, Ohio. Mrs. Podborny agreed to pay McLean $5,000, and asked him to hold her ring as collateral while she returned to Chicago to obtain the money. After the meeting, Toney and Mrs. Podborny travelled to Chicago where Mrs. Podborny paid Toney $5,000. Toney later gave McLean $2,500 as his share. (Tr. 1770-82, 2947-55, 2962-64).

In July 1980, McLean persuaded acquaintances to make threatening telephone calls to Mrs. Podborny to convince her that she continued to need protection. (Tr. 2964-66). In August 1980, Mrs. Podborny paid Toney an additional $10,000 for protection. Toney, in turn gave McLean $2,000. (Tr. 2981-82). Mrs. Podborny paid Toney because she was terrified, she believed her life was in danger, and she trusted Toney. (Tr. 5357-59).

In August 1980, Toney travelled to Chicago and met with Mrs. Podborny. Mrs. Podborny informed Toney that she wanted to hire someone to murder Mr. Podborny. (Tr. 1784-86). Toney contacted McLean to discuss the amount

they would charge Mrs. Podborny for arranging the killing.[2] They also planned to tell Mrs. Podborny that "Sonny" (a non-existent person) would kill Mr. Podborny.[3] A few days later, Mrs. Podborny paid Toney $24,400. Toney later gave McLean $1,000. (Tr. 1784-1818; 2966-29).

According to Toney, she telephoned O'Neal, her longtime friend and former employer. O'Neal travelled to Chicago. O'Neal and Toney discussed the fact that Mrs. Podborny wanted to have her husband killed. Toney claimed she gave O'Neal $6,500. (Tr. 1807-08; 1818-19; 4043-45; 4840-41). O'Neal had met Mr. and Mrs. Podborny about eight years earlier. At that time, Toney was O'Neal's bookkeeper in Cleveland. Toney introduced O'Neal to Mrs. Podborny apparently because Mrs. Podborny wanted to purchase a saw from O'Neal. Following the sale, O'Neal delivered the saw to the Podbornys' home near Chicago where he met Mr. Podborny. Between that time and August 1980, O'Neal did not again encounter Mr. Podborny. (Tr. 1826-27; 4835-37). Toney claimed she arranged a meeting between O'Neal and Mrs. Podborny, apparently during August of 1980. At that meeting, Toney alleged O'Neal pretended to be employed by

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[2] Toney disputed the fact that she and McLean intended to arrange the killing of Mr. Podborny. Toney, an admitted liar, Tr. 2120, repeatedly testified that she only pretended to arrange the killing in order to obtain more money from Mrs. Podborny. *See, e.g.*, Tr. 1790.

[3] Toney also knew a "loan shark" named Sonny Pace. She testified, however, that Sonny Pace and the fictional "Sonny" were not the same person. (Tr. 1808-09; *see also* 3064-65).

"Sonny" to protect Mrs. Podborny from her husband. (Tr. 1820-21).

In late August 1980, Toney travelled to Chicago in order to calm Mrs. Podborny, who was upset because Mr. Podborny had not yet been killed. Mrs. Podborny informed Toney that she wanted Mr. Podborny killed at his business rather than at home. (Tr. 1798). In early September 1980, McLean travelled to Chicago and met with Toney and Mrs. Podborny. They discussed her impatience with the inaction. McLean suggested poisoning Mr. Podborny, but Mrs. Podborny rejected this idea. (Tr. 1812-13). Following the meeting, McLean and Toney reconnoitered Mr. Podborny's pallet company in order to plan a robbery. (Tr. 1813). Toney carried a .38 caliber revolver during the reconnaissance. (Tr. 3243-44).

In September 1980, Mrs. Podborny filed a petition for dissolution of marriage. (Tr. 1806, 5352). In her petition for dissolution, she alleged that her husband and two others were conspiring to murder her. (Tr. 5352-53).

In late September 1980, Mrs. Podborny left her home near Chicago and moved to Cleveland to live with her son and Toney. (Tr. 1822-23). Toney alleged she spoke with O'Neal nearly every day during this time. Although O'Neal was experiencing financial difficulties, she said she did not give him any more money. (Tr. 1822-23).

After living in Cleveland for several weeks, Toney and Mrs. Podborny drove to Chicago for two days to attend a hearing in connection with the dissolution action. Toney alleged that O'Neal and Allen also travelled to Chicago at this time. Toney, Allen, and Mrs. Podborny attended the hearing, during which the court gave Mrs.

Podborny permission to re-enter her Chicago home to retrieve her property. O'Neal did not attend the hearing. Following the hearing Toney, Allen and Mrs. Podborny went to the Podborny residence. O'Neal did not accompany them. When they arrived at the house, Mr. Podborny and several grandchildren were there. At some point, Mr. Podborny experienced a heart attack. Paramedics were summoned and he survived. Later that evening, O'Neal allegedly asked Mrs. Podborny why she had not let Mr. Podborny die. Mrs. Podborny responded that she could not because the grandchildren were present. O'Neal, Toney, and Mrs. Podborny returned to Cleveland together. (Tr. 1824-1832).

During November 1980, Mr. Podborny frequently telephoned Mrs. Podborny. (Tr. 1834). Toney and O'Neal allegedly talked "just about daily," because he was still experiencing financial difficulties. *Id.*

In December 1980, Mrs. Podborny asked Toney to contact Leland Waress, an individual with connections to the Hell's Angels motorcycle club, to ask him to arrange to have Mr. Podborny killed. (Tr. 1836-37). They also discussed kidnapping Mr. Podborny as a method for obtaining access to his money. (Tr. 1842-44). In January 1981, Toney met Waress and discussed not only having Mr. Podborny killed by a member of the Hell's Angels, but also a number of other plans, including a plan to kidnap Mr. Podborny and hold him in the basement of O'Neal's saloon in Cleveland. (Tr. 1840).

The conspirators eventually decided to have Mrs. Podborny lure Mr. Podborny to Cleveland under the guise of reconciling their marital problems. While Mr.

Podborny was in Cleveland, Toney claimed O'Neal would kidnap and hold Mr. Podborny in the basement of his saloon while the others robbed the Podborny residence and the pallet company in Chicago. (Tr. 1836-1851). They would then return Mr. Podborny to Chicago, where he would be "given some medication and some whiskey and turned loose." (Tr. 1842).

At some point, Toney contacted her brother, Gary Gabbard, to obtain his help in robbing Mr. Podborny's residence and business. Waress told Gabbard that Toney had suggested that one way to avoid problems following the robbery was to murder Mr. Podborny. (Tr. 5173-5239). Gabbard agreed that killing Mr. Podborny was a possibility, because "dead people don't talk." (Tr. 5229).

In late January 1981, Toney and Waress met in Independence, Ohio. Toney told Waress that O'Neal had agreed to hold Mr. Podborny while the others robbed his residence and business. She showed Waress a list of Mr. Podborny's bank accounts and the amount of money in each account. They discussed the possibility of having McLean pose as Mr. Podborny after the kidnapping and murder, because McLean resembled Mr. Podborny. Following this meeting, Waress was excluded from the plan, apparently because the others decided they did not need him. Although Waress attempted to locate Toney and O'Neal, he was never able to do so. (Tr. 5173-5239).

Toney testified that, on January 29, 1981, the following events occurred. Mr. Podborny flew to Cleveland, Toney met him at the Cleveland airport and drove him to O'Neal's saloon. Toney left Mr. Podborny in front of the saloon and watched him enter. Between five and ten

minutes later, O'Neal exited the saloon and entered Toney's automobile. O'Neal gave Toney Mr. Podborny's wallet, his traveler's checks, a credit card, and his keys. Toney took money from Mr. Podborny's wallet and gave it to O'Neal. She then drove around a nearby corner and stopped. (Tr. 1855-66; 1882-95). A few minutes later, Allen entered the car and told Toney that he had struck Mr. Podborny with a pipe so that he could not run. (Tr. 1962). The trio did not discuss further what had happened inside the restaurant. Toney understood that Mr. Podborny "was secure. He wouldn't get loose." (Tr. 1863). Toney then drove O'Neal and Allen to another saloon. She left them and proceeded alone to a restaurant, where she telephoned McLean. Toney and McLean met in Richfield, Ohio, where Toney gave McLean Mr. Podborny's traveler's checks, credit card, and driver's license. They discussed several plans to obtain the money from Mr. Podborny's bank accounts. Later that evening, Toney gave Mrs. Podborny the wallet and keys. (Tr. 1855-96).

On January 30, 1981, Toney, Mrs. Podborny, Gabbard, and three others drove to Chicago. Toney, Mrs. Podborny, and Gabbard went to Mr. Podborny's home, where they found firearms and two coin containers. They also went to the pallet company, where Mrs. Podborny opened a safe, but did not find any money. They then returned to Cleveland. (Tr. 1896-1909).

During February and March 1981, Toney, Mrs. Podborny, and McLean attempted to obtain money from Mr. Podborny's bank accounts by establishing a back account in Ohio under the name "Dimple Pallet Company" and transferring money from Mr. Podborny's bank accounts in Chicago to the Ohio account. (Tr. 1928-29; 1934-38;

3017-25). To avoid arousing suspicion over Mr. Podborny's disappearance, Toney, McLean, and Mrs. Podborny attempted to make it appear as though Mr. Podborny was travelling in different areas of the country. To this end, McLean, who resembled Mr. Podborny, flew to Florida posing as Mr. Podborny. Mrs. Podborny and Toney fabricated a letter that appeared to have been written and mailed by Mr. Podborny from Buffalo, New York. Mrs. Podborny later assured an employee at the pallet company that Mr. Podborny was in Florida and that she had received a letter from him that he mailed from Buffalo, New York. (Tr. 1930-1956).

O'Neal allegedly told Toney during February and early March 1981 that Mr. Podborny "was okay." (Tr. 1934, 1939). She informed McLean that O'Neal "wanted $500.00 for keeping Hank." *Id.* Toney claimed she gave O'Neal $300 in mid-March 1981. (Tr. 1941-45). By late March, Toney believed that Mr. Podborny was no longer alive. (Tr. 1945-46). The record is not clear why she reached that conclusion. *See id.*

In mid-February 1981, McLean was arrested by FBI agents for forging Mr. Podborny's traveler's checks. McLean informed the agents that he knew about the disappearance of Mr. Podborny, and he agreed to assist them in locating him. On several occasions between March 17, 1981, and March 25, 1981, McLean met with Toney. With McLean's consent, the FBI recorded their conversations. The tapes, containing information regarding the participation of Toney and Gabbard in Mr. Podborny's kidnapping and murder, were admitted into evidence at O'Neal's trial. (Tr. 4783-90). (Doc. 10, Ex. D, p. 7).

On April 24, 1981, a dead body was found in a field in Cleveland. *Id.* On April 25, 1981, Dr. Lester Adelson, of the Cuyahoga County Coroner's Office, performed an autopsy on the body. (Tr. 3707). He determined that the victim had been struck at least five times in the head, and shot once in the forehead. (Tr. 378-09). The combination of these injuries caused death. (Tr. 3715). The victim had been dead "for a period of at least weeks." (Tr. 3711). Dr. Adelson examined the entire body and did not discover any injuries below the neck. (Tr. 3717). The body was later identified as Henry Podborny. (Tr. 3630-33).

OPINION

I. O'Neal's First Claim Is Not Cognizable In Federal Habeas Corpus

O'Neal argues that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5; Doc. 12, p. 5, Doc. 49, p. 11).

A federal court may review a state prisoner's habeas corpus petition only on the ground that the challenged confinement violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988).

O'Neal's first claim is not cognizable in the instant action, because he seeks to raise an issue of state law –

whether the trial court erred in denying his motion for a mistrial under Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20.

II. O'Neal's Challenge To The Racial Composition Of The Petit Jury Cannot Be Recognized

O'Neal argues that his rights under the sixth and fourteenth amendments were violated when State's counsel exercised his peremptory challenges to exclude six individuals from the petit jury solely on the basis of race. (Doc. 31, pp. 9-21). O'Neal concedes that *Batson v. Kentucky*, 476 U.S. 79 (1986), does not apply retroactively to the instant action, leaving him the "insurmountable" burden of establishing a prima facie case of racial discrimination under the standards of *Swain v. Alabama*, 380 U.S. 202 (1965). *Id.* at 13-16. Consequently, rather than mounting a fourteenth amendment *Swain*-based challenge, O'Neal argues that his sixth amendment rights were violated based on the standards announced in *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker*, 478 U.S. 1001, *reinstated*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

O'Neal's argument cannot be accepted, because the Supreme Court has now determined that the sixth amendment does not prohibit a prosecutor from eliminating prospective jurors on the basis of race. *See Holland v. Illinois*, 493 U.S. 474, 477-87 (1990). To avoid this ruling, O'Neal argues that *Holland* established a "new" rule of constitutional law and, as a result, it cannot be applied retroactively to bar his sixth amendment claim. (Doc. 49, pp. 12-13) (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

Although he correctly states that a new rule of federal constitutional law does not apply retroactively to cases on collateral review unless it fits one of the *Teague* exceptions, 489 U.S. at 310, this principle does not apply to *Holland*. When the Supreme Court determines, as in *Holland*, that a particular constitutional amendment does not contain a right that might be favorable to convicted defendants, the ruling does not implicate the concerns underlying retroactivity. These concerns focus on the deleterious effects that retroactive application of new rules of constitutional law have on the states, such as forcing states to justify the legality of a convicted defendant's confinement in light of newly evolved constitutional commands, depriving states of the opportunity to finalize criminal proceedings, and undermining the goal of deterring criminal activity. 489 U.S. at 309-10. None of these concerns apply to *Holland*, because convicted defendants cannot benefit from its holding. Consequently, defendants will not seek to collaterally challenge their convictions based on *Holland* and states will not suffer the costs of fending off such challenges.

O'Neal argues that he is entitled to benefit from the holding of *Booker* that the sixth amendment protects against racially discriminatory jury selection, 775 F.2d at 770-71, because *Booker* was in effect in the Sixth Circuit, and therefore "binding on . . . the State of Ohio" during O'Neal's direct state appeals. (Doc. 31, p. 19). O'Neal further argues, "Booker is still the law for the Sixth Circuit." O'Neal also argues that there exists an inequity in denial of retroactivity which prevents him from raising a fourteenth amendment *Batson* claim, while applying retroactivity to the *Holland* decision. *Id.* These contentions

lack merit, because the Supreme Court held that the sixth amendment has never prevented a prosecutor from exercising peremptory challenges in a racially discriminatory manner. *See Holland*, 493 U.S. at 478. The sixth amendment right to raise a claim of race-based exclusion in jury selection did not die in *Holland*, it simply never existed. *Booker*, therefore, according to the Supreme Court, is implicitly an incorrect decision. *See Holland*, 493 U.S. at 478.

The aforementioned conclusion is reached with reluctance, because we do not personally agree with the *Holland* decision. The undersigned has, in a previous case, ruled the sixth amendment prohibits discriminatory jury selection. *See, e.g., Bell v. Morris*, No. C-1-86-1241, Report and Recommendation (S.D. Ohio June 29, 1989).

Nevertheless, we believe the *Holland* ruling requires the result reached in this case. However, the District Judge should be aware that a contrary analysis has been made by District Judge Spiegel in *Bell v. Morris*, C-1-86-1241 (S.D. Ohio Jan. 8, 1991). Judge Spiegal ruled that the *Holland* decision was not dictated by existing precedent and, therefore, represented a new rule of law that should not be applied retroactively. That decision is presently pending on appeal.

O'Neal's allegations of racially discriminatory jury selection are quite serious. He relies, in part, on the prosecutor's remarkable explanation for exercising his sixth peremptory challenge to exclude a black woman from the petit jury: "she was very defense-minded . . . and the fact that she has already testified for a defendant, and also *on the basis of race.*" (Tr. 1496-97)

(emphasis added); *see also Ohio v. Podborny*, 41 Ohio App. 3d 135, 138 (Wiest, J., dissenting). The trial judge then informed the prosecutor that Ohio law provided him an unlimited right to exercise peremptory challenges. (Tr. 1497-98).

Since the Supreme Court has held the sixth amendment does not support O'Neal's challenge to discriminatory jury selection, and since *Batson* does not apply retroactively to O'Neal's conviction, he must rely on the fourteenth amendment as a basis for his claim. *Supra*, p. 10. O'Neal, however, has not attempted to establish a prima facie case of racial discrimination based on the standards of *Swain*. *See* Doc. 31, pp. 9-21.

Accordingly, O'Neal's second claim cannot be recognized as a separate ground for granting a habeas corpus writ.

III. The Trial Court Did Not Violate O'Neal's Rights Under the Confrontation and Compulsory Process Clauses of the Sixth Amendment

O'Neal claims that the trial court violated his rights under the Confrontation Clause of the sixth amendment by limiting his crossexamination of Special Agent Fredrick Graessle of the Federal Bureau of Investigation (FBI).

Graessle was subpoenaed as a witness by co-defendant Dimple Podborny to testify about McLean's role as an FBI informant. Graessle responded to a limited number of questions on direct examination, which previously had been submitted to and approved by the United

States Justice Department in accordance with procedures set forth in 28 C.F.R. § 16.21, *et seq.*, regarding the disclosure of any information acquired by an employee of the Department of Justice in the performance of his official duties.[4]

On direct examination, Graessle testified that he was a special agent with the FBI in Cleveland, Ohio and that on March 10, 1981, McLean had asked him about the possibility of obtaining immunity from federal prosecution in return for "turning State's evidence." (Tr. 5081-82). Graessle said that he told McLean that he did not have the power to promise anything "on those lines," but did advise McLean that an Assistant United States Attorney, who was able to make promises regarding prosecution, "was very interested in obtaining McLean's cooperation regarding this matter." (Tr. 5082). When McLean asked Graessle whether there were other federal charges pending against him, Graessle told McLean that he knew of no other federal charges at that time, but that there were

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[4] These federal regulations prohibit Justice Department employees from disclosing such information without prior departmental approval. The regulations further provide:

> If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceedings, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

28 C.F.R. § 16.22(a), (c).

other crimes which had been uncovered as a result of the FBI's investigation with which McLean might be charged. *Id.* Graessle further testified that McLean said he might have information that could identify Podborny's killer, as well as when, where, and how Podborny may have been killed. (Tr. 5082-83).

O'Neal's counsel sought to pose additional questions to Graessle on cross-examination, because Graessle had been present when O'Neal made certain incriminating statements to the Cleveland Police on March 26, 1981, and, according to O'Neal, was an "active participant in the gathering of evidence and prosecution of this case." (Doc. 31, p. 38; Tr. 203-17). O'Neal's counsel asked Graessle if he had been involved in the FBI investigation when Podborny's body was found and whether he could tell who provided the information "as to where that body was." (Tr. 5083-84). Graessle refused to answer these questions, stating "I'm not authorized by the Department of Justice to answer that." (Tr. 5084).

The trial court sustained objections to O'Neal's line of questioning after an Assistant United States Attorney explained at side bar that Graessle could not answer questions which had not been previously approved in accordance with federal regulations. (Tr. 5088). The court explained to the jury that "no employee of the Department of Justice may testify without prior authorization . . . as to the questions he is going to be asked." (Tr. 5090-91). After the court sustained an objection to another question about Graessle's involvement in the presentation of the case, O'Neal's counsel said he would sit down without asking any further questions even though he had

"a lot of other questions [he] would like to ask." (Tr. 5091).

On O'Neal's direct appeal, the Ohio Court of Appeals made the following findings of fact, which are entitled to the presumption of correctness:[5]

> [O'Neal] could have but did not subpoena the FBI Agent. [He] could have but did not submit the required application to the Justice Department. [He] could have but did not request a continuance of the trial so that he could pursue the application requirement.

(Doc. 10, Ex. C, p. 8).

O'Neal argues that he should have been allowed to cross-examine Graessle about (1) the circumstances surrounding O'Neal's statements to the police to show the statements were unreliable; (2) the identity of the informant who found Podborny's body and notified the FBI of this fact to discredit the testimony of Wilbur Higgins, who testified that he notified a city inspector of the location of Podborny's body after O'Neal told him where it was; and (3) payments made to McLean for his testimony and by the FBI for his role as an informant in other cases to undermine McLean's credibility with the jury. (Doc. 49, pp. 24-25).

The Confrontation Clause of the sixth amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him."

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[5] *See* 28 U.S.C. § 2254(d); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); *Nichols v. Perini*, 818 F.2d 554, 557-58 (6th Cir. 1987).

One of the main purposes of the right of confrontation is to ensure a defendant's right to impeach and otherwise challenge adverse testimony by way of cross-examination. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984). However, the right of confrontation does not include the right to cross-examine witnesses who have provided favorable testimony. *See United States v. Kindig*, 854 F.2d 703, 708 (5th Cir. 1988); *United States v. Crockett*, 813 F.2d 1310, 1313-14 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987); *United States v. Andrews*, 765 F.2d 1491, 1501 (11th Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986). In determining whether or not a witness has provided adverse testimony implicating a defendant's rights under the Confrontation Clause, the Court must assess the actual content of the witness's testimony, not whether he was called by the prosecution or on behalf of a co-defendant. *United States v. Crockett*, 813 F.2d at 1314; *see also United States v. Kindig*, 754 F.2d at 708-09.

In this case, Graessle was not called as a witness by the prosecution, but by a co-defendant. He did not provide any testimony that could have adversely affected O'Neal's defense. Indeed, the testimony was favorable to O'Neal because it suggested that McLean had a self-interest motive in testifying for the prosecution. In posing additional questions to Graessle, O'Neal's attorney was attempting to elicit further favorable testimony, rather than impeach Graessle or to challenge the testimony he had given on direct examination. O'Neal's rights under the Confrontation Clause were therefore not implicated by the trial court's limitation of the cross-examination of

Graessle to only those areas covered by the authorization granted co-defendant Dimple Podborny.

The right to elicit favorable testimony is encompassed by the sixth amendment right of a defendant "to have compulsory process for obtaining witnesses in his favor." *United States v. Crockett*, 813 F.2d at 1313. The Compulsory Process Clause of the sixth amendment guarantees the criminal defendant's fundamental right to present witnesses in his own defense. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). The right to offer the testimony of witnesses and to compel their attendance, if necessary, is included in the right to present a defense, which is "a fundamental element of due process of law." *Id.* at 409, quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967). However, although the right of the defendant to present evidence stands on the same footing as other sixth amendment rights, there is a significant difference between the right to compulsory process and other sixth amendment rights, because the availability of the right to compulsory process "is dependent entirely on the defendant's initiative." *Id.* at 410. The decision whether to employ the right to compel the presence and present the testimony of witnesses rests solely with the defendant, and the "very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." *Id.* In the exercise of the right to present witnesses, the defendant must comply, like the prosecution, with established rules of procedure and evidence to assure both fairness and reliability in the trial proceedings. *Id.* at 411 and n.15.

In the instant case, O'Neal's counsel had the opportunity to demand the testimony of Graessle in accordance

with the procedures set forth in 28 C.F.R. § 16.21, *et seq.*, but did not do so. Because he failed to exercise his right to compel the presence and present the testimony of Graessle, O'Neal cannot now claim that right was violated. *Cf. United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981). Furthermore, defense counsel developed much of the same information O'Neal sought from Graessle during the cross-examination of police officers Timothy Patton and Jerry Hruby. (Tr. 3557-58, 4523-31, 4541-42).

Accordingly, O'Neal's claim that the trial court violated his rights under the Confrontation Clause or Compulsory Process Clause of the sixth amendment lacks merit.

IV. The Jury Instructions Regarding Intent Violated O'Neal's Right to Due Process of Law

O'Neal raises two arguments challenging the jury instructions given at trial. First, he argues that the trial court deprived him of a fair trial by giving extensive instructions on conspiracy which forced O'Neal to defend against a conspiracy charge not contained in the indictment. (Doc. 31, pp. 28-30). Second, O'Neal contends that the jury instructions deprived him of his rights under the fourteenth amendment Due Process Clause by relieving the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. (Doc. 31, pp. 22-26; Doc. 49, pp. 14-15; Doc. 65). According to O'Neal, this occurred when the trial court spoke of intent in terms of "the defendants or co-conspirators or aiders and abettors" as a group, which created the "automatic presumption that if any of the aider and abettors, co-

defendants, or co-conspirators possessed the culpable mental state," it could be imputed to all others. (Doc. 49, p. 16). The instructions at issue are set forth verbatim in Appendix A, attached hereto.

A. The Conspiracy Instructions, In and Of Themselves, Did Not Violate O'Neal's Right To Due Process

Under the Due Process Clause of the fourteenth amendment, the charging method employed by a state must give the criminal defendant fair notice of the charges against him so that he may adequately prepare a defense. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Olsen v. McFaul*, 843 F.2d 918, 930 (6th Cir. 1988); *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984); *Watson v. Jago*, 558 F.2d 330, 338-39 (6th Cir. 1977). It is a well established principle of procedural due process that notice of the specific charge, and an opportunity to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in both state and federal criminal proceedings. *Cole*, 333 U.S. at 201; *In re Oliver*, 333 U.S. 257, 273 (1948). *See generally Hovey v. Elliot*, 167 U.S. 409, 414-18 (1897).

In this case, the indictment provided O'Neal with fair notice of the charges against him. The indictment charged O'Neal with aggravated murder, aggravated robbery and kidnapping, and the trial court properly instructed the jury that those were the three counts before it. (Tr. 6157). The court restated the charges against O'Neal at the end of its instructions and discussed the elements of "conspiracy" and "aiding and abetting" solely for the purpose of

determining complicity. (Tr. 6177-93). Indeed, the trial judge specifically pointed out when instructing on the elements of "conspiracy" and "aiding and abetting" that the defendants had not been charged with any offense under the Ohio conspiracy statute. (Tr. 6177-78). *Contrast Koontz v. Glossa*, 731 F.2d at 369-70.

In Ohio, a defendant can be charged with complicity either in terms of the principal offense or as an aider and abettor or co-conspirator in the commission of the principal offense. Ohio Rev. Code Ann. § 2923.03(A),(F) (Anderson 1987) (effective Jan. 1, 1974). *See Hill v. Perini*, 788 F.2d 406, 407 (6th Cir.), *cert. denied*, 479 U.S. 934 (1986). "This practice has apparently been established in Ohio for over 100 years." *Id.*, citing *Hanoff v. State*, 37 Ohio St. 178 (1881). This practice, which permits jury instructions on complicity even though the defendant has been charged and tried as a principal, does not deprive the defendant of due process of law. *Id.* at 407-08. Because the practice was settled law in Ohio at the time of O'Neal's trial, O'Neal had notice of the possibility that the judge might instruct the jury regarding aiding and abetting and conspiracy for the purpose of determining complicity. *Id.*

B. The Jury Instructions On The Intent Element Of Each Offense Violated O'Neal's Right To Due Process

The Due Process Clause of the fourteenth amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard applies to each element of a criminal offense to

minimize the possibility of any fact-finding errors in an attempt to ensure that a state incarcerates only the guilty. *See id.* at 363-65. The trial court may not instruct a jury in a manner that shifts to a defendant the burden of proving a critical fact in dispute, not only because this violates a defendant's right to the presumption of innocence, but also because it increases the likelihood of an erroneous conviction. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). Where intent is an element of the charged offense, the court may not instruct a jury that the existence of certain facts automatically establishes the element of intent. *Sandstrom v. Montana*, 442 U.S. 510, 521-23 (1952). A jury instruction that creates such a mandatory presumption offends the Due Process Clause because it relieves the State of its burden of proof on an essential element of the charged offense. *Id.*

This case does not involve the use of a mandatory presumption, because the jury was never instructed that it must infer that the defendant had a purpose to commit the charged offenses based on other facts in evidence. *Cf. Clark v. Jago*, 676 F.2d 1099, 1104 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984). However, the principles set forth in *Sandstrom* and *Mullaney* are applicable, because the primary due process concern in those cases was whether the challenged practice had the effect of relieving the State of the burden of proof on an element of the crime charged. *Id.; see also Sandstrom*, 442 U.S. at 521-24; *Mullaney*, 421 U.S. at 699-701. If the challenged instruction is found to have had such an effect, the error will constitute a due process violation unless the instructions as a whole would have prevented a reasonable juror from

assuming that the State did not have to prove the defendant's independent intent to commit the crimes charged. *See Francis v. Franklin*, 471 U.S. 307, 314-15 (1985).

In order to determine whether the challenged instructions relieved the State of the burden of proof on the issue of O'Neal's state of mind, it is necessary to examine what is required to establish intent under Ohio's complicity statute. *Cf. Flowers v. Blackburn*, 779 F.2d 1115, 1120 (5th Cir.), *cert. denied*, 475 U.S. 1132 (1986). The statute provides in pertinent part:

> (A) No person, *acting with the kind of culpability required for the commission of an offense*, shall do any of the following:
>
> * * *
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code[.]

Ohio Rev. Code Ann. § 2923.03 (Anderson 1987) (emphasis added).

Under this statute, aiders and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. *State v. Lockett*, 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds*, 438 U.S. 586 (1978). The Ohio Supreme Court has held, in the context of the crime of aggravated murder, that a defendant cannot be convicted solely because he engaged in a felony that resulted in a murder; rather, the prosecution must always prove intent to kill, including cases where it proceeds on a complicity theory. *State v. Scott*, 61 Ohio St.

2d 155, 166 (1980); *see also Clark v. Jago*, 676 F.2d at 1104. A jury may properly infer an aider and abettor's intent to kill where the facts show that the participants in a felony entered into a common design and the aider and abettor knew either that an inherently dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment would be reasonably likely to produce death. *Scott*, 61 Ohio St. 2d at 165; *see also Lockett*, 49 Ohio St. 2d at 59-60. Therefore, the State in the instant case could attempt to prove O'Neal's intent to kill either by producing direct evidence of intent or by producing evidence to support a *Lockett/Scott* inference.

A jury instruction on intent to kill, based on the state of mind of "defendant and/or his accomplice," relieves the prosecution of its burden of proving an aider and abettor's independent intent to kill as required under Ohio law. In that circumstance, the instruction can be interpreted by a reasonable juror to mean that the defendant personally did not have to have the intent to kill in order to be convicted. The jury may believe that the accomplice's intent is sufficient to convict the defendant for aggravated murder. *Clark v. Jago*, 676 F.2d at 1105; *Bell v. Morris*, 923 F.2d 854 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied*, 111 S. Ct. 2262 (1991). Here, the trial court did not go so far as to specifically state that O'Neal's intent to commit the crimes charged could be inferred from the state of mind of any other defendant, co-conspirator or accomplice. However, in instructing the jury on the elements of the offenses, the court discussed intent generally in terms of the state of mind of the "defendants, co-conspirators, or

aiders and abettors" without reference to the intent required of each defendant individually. (*See* App. A, pp. 2, 3, 5-6, 7-8). These instructions were confusing, because they failed to set forth the requirement that each defendant have the intent to commit the offenses charged in order to be found guilty. Without further explanation, a reasonable juror could have interpreted these instructions to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the intent of others participating in the alleged conspiracy.

These errors in the jury instructions constitute a due process violation unless the instructions as a whole explained the confusing language so that a reasonable juror could not have concluded that the intent of one co-conspirator could be imputed to others. *See Francis v. Franklin*, 471 U.S. at 315; *Clark v. Jago*, 676 F.2d at 1105-06.

When instructing on the intent element of the crime of aggravated murder, the court stated:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: . . . where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

(App. A, p. 2). This instruction was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations. (Tr. 6208). Although the instruction was stated in pro-prosecution terms of a finding of guilt, it appears to set forth one of the two appropriate methods of inferring an accomplice's or co-conspirator's intent to kill under *Lockett* and *Scott*.

The trial judge also instructed the jury to "separately consider the elements applicable to each one of the defendants as [if] he or she were separately tried" and to "consider your finding as to each defendant uninfluenced by your verdict as to the other defendant." (App. A, pp. 3, 16). Further, when giving its instructions on complicity and conspiracy, the court told the jury that the State had to prove beyond a reasonable doubt the existence of a conspiracy or complicity among the defendants and the other co-conspirators before it could render a guilty verdict on the main charges. (App. A, pp. 7, 12, 13-14, 15). *Contrast Bell v. Morris*, 923 F.2d 854, at *13-14 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied*, 111 S. Ct. 2262 (1991).

On the other hand, no instructions were given regarding the requisite intent of an accomplice or co-conspirator on the charges of aggravated robbery or kidnapping. Nor did the court ever explicitly instruct the jury, with respect to any of the three offenses charged, that the State had to prove an accomplice's or co-conspirator's independent intent to commit the crimes. When instructing on the elements of complicity, the court stated: "[W]here two or more persons have a common purpose to commit a crime and wherein a continuing sequence over [sic] events other crimes are committed, all

of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed." (App. A, pp. 11-12). Given that the court repeatedly lumped "defendants, co-conspirators, and aiders and abettors" together throughout its instructions, without clarifying that an independent purpose to commit the crimes was necessary for a conviction, this instruction could have been interpreted by a reasonable juror to mean that an accomplice could be convicted for crimes only the principal offender intended to commit during the sequence of events.

The risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's closing remarks:

> MR. MARINO: Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable (sic). That's incorrect."

(Tr. 6075). The judge overruled an objection to this statement, thus appearing to endorse it. *Id.* The prosecutor continued:

> MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a

course of criminal conduct which eventually led to the commission of those crimes.

MR. MILANO: Objection. It is a misstatement of the law, sir.

THE COURT: Overruled.

MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it (referring to the trial of the codefendants).

MR. COUGHLIN: Objection, your Honor.

THE COURT: Overruled. I would indicate the first case will not be mentioned in this closing argument.

(Tr. 6075-76). By making the aforementioned rulings, the trial judge endorsed the prosecutor's misstatement of law and confirmed to the jury that a similar instruction had been given in the trial of the codefendants. The prosecutor's remarks were likely to have been accepted by the jury as the law, because they came from a state official charged with prosecuting criminal cases and were essentially endorsed by the trial judge. The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

In the context of the instructions as a whole, viewed in light of the prosecutor's remarks in his closing argument, which were endorsed by the trial court's refusal to sustain an objection, the remaining instructions were insufficient to dispel the possibility of confusion. A reasonable juror could have concluded that the intent of one

co-conspirator could be imputed to other participants in the alleged conspiracy. Thus, these erroneous instructions constituted a violation of O'Neal's right to due process of law.

However, this does not end the inquiry. We must next determine whether this due process violation amounted to harmless error. *See Clark v. Jago*, 676 F.2d at 1105. Because this determination involves examination of the entire trial, we will make this analysis after review of other alleged errors. *See infra*, pp. 41-49.

V. The Additional Alleged Trial Errors of Nonconstitutional Dimension Were Sufficiently Prejudicial to Implicate O'Neal's Fair Trial Rights

O'Neal argues that he was deprived of his fourteenth amendment Due Process right to a fundamentally fair trial because the trial court erroneously admitted into evidence gruesome photographs of the murder victim, as well as other inflammatory physical evidence, and because the prosecutor committed acts of prejudicial misconduct during trial. (Doc. 31, pp. 30-36, 38-43).

The scope of federal habeas review of these claims is narrow. Where, as here, no specific constitutional guarantee is involved, these claims of ordinary trial error do not rise to a constitutional level unless the errors were so prejudicial as to deprive a defendant of a fair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974); *Martin v. Foltz*, 773 F.2d 711, 716 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). *See also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

A. The Admission of Certain Evidence Prejudiced O'Neal

O'Neal challenges the admission into evidence of eighteen photographs of the murder victim taken at the coroner's office, showing the victim from different angles in various stages of undress, and eight close-ups of the victim's face. (*See* Tr. 3710-13). O'Neal also challenges the admission of nine photographs showing the victim in the field where he was discovered; the actual "smelly" clothing and wrappings in which the victim was discovered; a jar containing the skin from the victim's left finger; a box containing scalp hair from the victim; and a crowbar found in O'Neal's bar. (*See* Tr. 3631, 4754, 4766, 4791, 4814).

In his assignments of error to the Ohio Court of Appeals, O'Neal argued only that the admission of photographs was prejudicial. (Doc. 49, A-164, II). Ordinarily, this would mean that O'Neal waived any claim on federal habeas review regarding the admission of the allegedly inflammatory physical evidence absent a showing of "cause" for and "prejudice" from his failure to raise this claim to the state appeals court. *See Ewing v. McMackin*, 799 F.2d 1143, 1148 (6th Cir. 1986); *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). However, the Ohio Court of Appeals *sua sponte* addressed whether the admission of Podborny's clothing, the skin from Podborny's finger and the crowbar unfairly prejudiced O'Neal. The only evidentiary issue the Court of Appeals did not address was the admission of the scalp hair. O'Neal has not presented any justification for his failure to raise that issue to the state appeals court, and this Court should therefore consider

that claim waived. However, since the Ohio Court of Appeals addressed the remainder of O'Neal's claims regarding the introduction of inflammatory physical evidence, this Court should consider those issues on the merits.

In determining whether the admission of the evidence was prejudicial to O'Neal, this Court must accord a presumption of correctness to the state court's findings of fact that are fairly supported by the record. *See* 28 U.S.C. § 2254(d); *see also Sumner v. Mata*, 455 U.S. 591, 597-98 (1982). This presumption of correctness does not attach to the state court's conclusions of law, or to its application of law to the facts. *Pryor v. Rose*, 724 F.2d 525, 528 (6th Cir. 1984) (en banc).

The Ohio Court of Appeals ruled on O'Neal's claim as follows:

> [The coroner's] photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin, removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way [sic] the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that

> amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by . . . O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with this case. . . . We . . . conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

(Doc. 10, Ex. C, pp. 6-7).

Ohio R. Evid. 403(A) generally provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." The risk of unfair prejudice occurs when the evidence is so gruesome or is "charged with such immediacy or emotional impact" as to produce an inflammatory reaction by the jury against the defendant. *State v. Benner,* 40 Ohio St. 3d 301, 311 n.2, 533 N.E.2d 701 (1988), *cert. denied,* 110 S.Ct. 1834 (1990); *State v. Tingler,* 31 Ohio St. 2d 100, 285 N.E.2d 710, 713 (1972); *State v. Hill,* 12 Ohio St. 2d 88, 90, 232 N.E.2d 394 (1967). The mere fact that the evidence is gruesome or horrendous is not sufficient to render it per se inadmissible. *State v. DePew,* 38 Ohio St. 3d 275, 281, 528 N.E.2d 542 (1988), *cert. denied,* 489 U.S. 1042 (1989). Rather, the risk of prejudice created by the introduction of such evidence must be balanced against the need for the evidence to prove an issue at trial. *See Papp v. Jago,* 656 F.2d 221, 223

(6th Cir.), *cert. denied,* 454 U.S. 1035 (1981); *see also State v. Martin,* 19 Ohio St. 3d 122, 129, 483 N.E.2d 1157 (1985) (per curiam), *cert. denied,* 474 U.S. 1073 (1986), quoting *State v. Maurer,* 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984), *cert. denied,* 472 U.S. 1012 (1985).

Under Ohio law, an additional element is involved in the balancing process when gruesome photographs are introduced in a capital prosecution. Such evidence is admissible only if "the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant" and the photographs are not repetitive or cumulative in nature. *State v. Morales,* 32 Ohio St. 3d 252, 513 N.E.2d 267, 273-74 (1987). The Ohio Supreme Court has noted that this standard, which is stricter than the usual standard for the admission of evidence, "is justified in capital cases because gruesome photographs which depict the victim of the offense are charged with such immediacy and emotional impact that the risk of prejudice is enhanced proportionately, a risk that we are less willing to tolerate in a case where the defendant faces a penalty of death." *State v. Benner,* 40 Ohio St. 3d at 311 n.2.

We have studied the eighteen photographs taken at the coroner's office (St. Exs. 1 through 1-Q). All of these photographs are gruesome. They graphically depict the deterioration to the victim's body and the injuries to the skull area, as well as the victim's distorted facial features, which were discolored by the wrappings encasing the body. The photographs of the victim's head (St. Exs. 1 through 1-G) are especially gruesome. *Cf. State v. Rowe,* 163 W. Va. 593, 259 S.E.2d 26, 28 (1979). They constitute relevant evidence of cause of death, intent to kill, and the

fact that the victim had been dead for a long period of time. The remaining ten pictures of the victim's body, which were taken as the wrappings and clothing were removed, are of possible relevance to prove efforts made to hide the body. The coroner and other witnesses, however, provided uncontradicted testimony at trial on all of these issues. (Tr. 3707-15). Furthermore, the defense did not contest either the cause of death, the intentional killing, or the efforts to hide the body. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 1 through 1-Q constituted prejudicial error.

As to the nine photographs introduced at trial showing the location where the victim's body was discovered, respondent submitted only seven to this Court for review.[6] The record indicates that six of the photographs depicted the area where the body was discovered, showing only the body encased in wrappings, and the remaining three photographs depicted the body at the discovery site as it was unwrapped. (Tr. 4491-92). We have carefully studied the seven photographs submitted, and we find they are consistent with the record description. These photographs constitute relevant evidence of the attempt to hide the body and the condition of the body when it was found. The six photographs depicting the area where

[6] Respondent admits that these photographs may not be the same photographs introduced in O'Neal's trial, but that they were the only photographs that could be found depicting the location of Podborny's body. (Doc. 67).

the body was discovered and the body encased in wrappings (St. Exs. 58, 58A, 58B, 58C, 58D, 58F) are not inflammatory. *Cf. State v. DePew*, 38 Ohio St. 3d at 281. Moreover, one of the three photographs submitted depicting the body as it was unwrapped at the scene (St. Ex. 58E) is not gruesome, because body parts are not recognizable in it. The remaining two photographs, which are close-up views of the victim's upper body and face, are gruesome enough to create a risk of prejudice. (St. Exs. 58G, 58H). The coroner and other witnesses provided uncontradicted evidence to establish the same facts these photographs were offered to prove. The defense did not contest the facts that the body was hidden and had deteriorated. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 58-G and 58-H constituted prejudicial erorr.

The admission of the jar containing the skin from the victim's left finger was prejudicial to O'Neal. We agree with the Ohio Appeals Court's finding that the skin was relevant to fingerprint identification of the decomposed remains as Mr. Podborny. However, the fingerprint taken from the skin, which was used to establish identity, was already in evidence. Furthermore, the identity of the victim was not contested by the defense. (Tr. 5714). Thus, although it was proper to preserve the victim's skin in the event the defense questioned the fingerprint identification, there was no need to admit the body part into evidence. The introduction of a part of the victim's body was charged with such emotional impact that it could only have constituted an appeal to the jury's passion. The

risk of prejudice far outweighed the probative value of the evidence because there was no need for this evidence. Therefore, the admission of the victim's skin constituted prejudicial error.

The admission of a "crowbar" found in O'Neal's saloon when Allen was arrested there around 12:00 a.m. on March 26, 1981 was also prejudicial to O'Neal. (Tr. 4439-40). The Ohio Court of Appeals found it was not relevant because there was no evidence connecting the crowbar with the murder. The crowbar was tested for the presence of blood, and the test results were negative. (Tr. 3702). Thus, the admission of the crowbar constituted prejudicial error.

Finally, the admission of the victim's malodorous bloodstained clothes was well as the wrappings that encased the victim's body was prejudicial to O'Neal. The Ohio Appeals Court concluded that the evidence had probative value because it tended to show that the body had lain for a long time before it was discovered and that attempts had been made to hide the body. However, there was other substantial uncontested evidence in the record to establish these facts, including photographs of the identical clothing and wrappings. (Tr. 4752-53). Thus, there was no need at all for the admission of this evidence. The admission of the victim's clothing and wrappings was highly inflammatory because the evidence was charged with an emotional immediacy. For these reasons, the admission of the said evidence constituted prejudicial error.

The aforementioned prejudicial errors are sufficient to trigger further inquiry as to whether O'Neal was deprived of a fundamentally fair trial.

B. The Prosecutor's Misconduct Prejudiced O'Neal

1. The Prosecutor Improperly Questioned O'Neal About a Previous Killing

O'Neal contends that the prosecutor improperly cross-examined him by eliciting details of a previous incident in which O'Neal shot and killed another person. O'Neal argues that the cross-examination elicited impermissible "other acts" evidence in violation of Ohio R. Evid. 404(B) and in violation of a court order prohibiting reference to the incident.

O'Neal's assignment of error to the Ohio Appeals Court regarding this issue claimed trial court error rather than prosecutorial misconduct. (Doc. 49, App. A-164, IV). The Ohio Court of Appeals, however, addressed the issue and made the following factual findings regarding this claim, which are entitled to the presumption of correctness. *See* 28 U.S.C. § 2254(d).

> [D]uring the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why [O'Neal's] gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why [O'Neal's] gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.

> [O'Neal's] gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination, in spite of its previous order, the court permitted the prosecutor to extensively cross-examine [O'Neal] about the details surrounding the manslaughter case. . . .

(Doc. 10, ex. C, p.4). This is a clear indication of prosecutorial misconduct. Furthermore, since we have already identified prejudicial trial errors, we are required to examine the entire trial for fairness. *See Arizona v. Fulminante*, 111 S. Ct. 1246, 1263-64 (1991).

On direct examination, O'Neal attempted to explain why he received $6,500 from Toney and what he did with it. He stated the money was originally intended to be Toney's investment in his business and was to be used to purchase a liquor license. However, the license cost more than that, so he held the money for other purposes. Subsequently, he was charged with a crime in East Cleveland, the nature of which he did not describe, and he used the $6,500 to pay attorney fees in that case. The case was dismissed, and he was able to retrieve a .38 caliber revolver that had been confiscated in connection with the case. He emphasized that the revolver was registered, and stated it would not have been returned otherwise. (Tr. 4844-46). His attorney then asked the following question and received the following answer:

> Q: You certainly wouldn't go out and kill someone with your registered gun, would you?
>
> A: I wouldn't do that.

(Tr. 4846-47). During direct examination, O'Neal did not mention the facts of the East Cleveland case except to say that he was "charged with something." (Tr. 4845).

Co-defendant Allen's attorney then elicited further testimony from O'Neal on the East Cleveland incident without mentioning that a shooting had occurred. O'Neal testified that a shell was fired from his revolver when it was confiscated in East Cleveland and that authorities had a sample of the bullet. (Tr. 4874, 4876). O'Neal testified further that there had been no testimony that the the [sic] bullets from his revolver had been compared to the bullet in evidence. (Tr. 4876).

On cross-examination, over numerous objections by O'Neal's counsel, the prosecutor asked the following questions, clearly implying that because O'Neal had killed Calvin Heinz in East Cleveland by shooting him in the head, he had done the same thing to Mr. Podborny.

> Q. You shot that pellet into Calvin Heinz' head, the same way you shot Henry Podborny in the head?
>
> * * *
>
> A. No, I didn't shoot Calvin's head like that.
>
> Q. But you did shoot Calvin Heinz in the head, didn't you?
>
> * * *
>
> A. No, I didn't shoot him in the head, it was an accident.

(Tr. 4908). During this exchange, O'Neal's counsel objected to each question, but the judge did not rule on the objections. *Id.*

Q. You shot him in the head; is that correct?

A. I had 50 witnesses brought in to say that it was on the record that they saw him when he was trying to kill me.

Q. The only witnesses were two lady friends?

Id. The Judge overruled an objection to these questions. *Id.*

Q. You attempted to mislead the jury yesterday in attempting to lead the jury to believe that your gun was confiscated because of a gun violation?

A. It was confiscated by the East Cleveland Police because of a gun registration violation and because of the accident in East Cleveland.

Q. Was the registration violation first?

A. Yes.

Q. And secondary importance to the East Cleveland police is the fact that Calvin Heinz was killed with a bullet fired in his head?

(Tr. 4910-11). The judge overruled an objection to this question. *Id.*

A. Yes, it was, sir.

Q. Did you tell the police that Calvin drew on you first and you shot him in the head?

[O'Neal's Attorney]: Objection, your Honor.

A. The witnesses saw that.

THE COURT: Sustained as to the other matter. I think you made a point and you go on to some other matter. Strike that. Go on to some other matter. I think you made a point out of this.

(Tr. 4911). Nevertheless, the prosecutor continued to compare the Heinz killing to the Podborny killing. (Tr. 4911-15). He asked O'Neal to acknowledge that the evidence had shown that Podborny was shot with a bullet "consistent with being fired from a Smith & Wesson .38 caliber." (Tr. 4912). The judge overruled an objection to this question. *Id.* The prosecutor continued:

Q. The gun that you used to shoot Calvin Heinz was a .38 caliber Smith & Wesson pistol?

A. I didn't use it to shoot Calvin Heinz.

Q. Did the bullet come out of the barrel by itself?

A. That's the gun I used.

Q. Do you know of any other way of firing a bullet from a revolved other than pulling the trigger?

A. I didn't pull the trigger, it was an accident. I hit the gun.

Q. You shot him in the head?

A. I hit him in the head. He was trying to shoot me.

Id. The prosecutor next attempted to have O'Neal compare the bullet identified as coming from Podborny's body to the bullet in the East Cleveland case. He had O'Neal examine the bullet in evidence and acknowledge that testimony had established that "this is the pellet that killed Hank Podborny." (Tr. 4914). He continued:

Q. And the one that killed Calvin Heinz is like that is it not?

A. I don't know, sir.

Id. The prosecutor continued:

> Q. Sir, if we had the pellet from Calvin Heinz we could have been able to compare the pellet from Calvin Heinz with the pellet from Mr. Podborny, couldn't we?

(Tr. 4915). The judge overruled an objection to this statement.

The prosecutor also called a rebuttal witness at the close of trial. The witness testified that O'Neal was arrested in the East Cleveland matter and told the arresting officer, "That guy pulled a gun on me so I shot him." (Tr. 5696).

Ohio R. Evid. 404(B) excludes the admission of evidence of "other crimes, wrongs, or acts" to prove the character of the accused in order to show that the accused acted in conformity with his character on the occasion of the crime charged. *State v. Sims*, 3 Ohio App. 3d 321, 445 N.E.2d 235, 238 (1981). The evidence is considered irrelevant because, among other things, it creates an "overstrong tendency" to believe the accused guilty of the charge merely because he is a person likely to do such acts as well as the tendency to condemn because the accused has escaped punishment from other offenses. *State v. Curry*, 43 Ohio St. 2d 66, 68, 330 N.E.2d 720 (1975). The introduction of such evidence is prejudicial because it may completely overthrow the presumption of innocence. *See Pierce v. United States*, 86 F.2d 949, 952-53 (6th Cir. 1936).

There are certain exceptions to this general rule. Proof of other bad acts is admissible to show motive or intent, the absence of mistake or accident, or a plan or

system of doing an act. Ohio Rev. Cod Ann. § 2945.59 (Anderson 1987); *see also State v. Curry*, 43 Ohio St. 2d at 69. Also, where a defendant in a criminal trial testifies as to his past good behavior and character, the State is permitted to impeach such testimony with evidence of past criminal conduct. *See State v. Hale*, 21 Ohio App. 2d 207, 256 N.E.2d 239, 244-45 (1969), citing *State v. Marinski*, 139 Ohio St. 559, 41 N.E.2d 387 (1942). In such a case, the extent of the examination into the character or reputation of the accused shall be no more than necessary to counter the evidence of good character presented by the accused. *Id.* at 245.

Moreover, the State has a limited right to challenge the credibility of a criminal defendant by evidence of prior offenses when the defendant takes the witness stand and gives testimony in his own defense. *See State v. Tharp*, 49 Ohio App. 2d 291, 297, 361 N.E.2d 469 (1976); *State v. Patterson*, 43 Ohio App. 2d 63, 71, 332 N.E.2d 770 (1974). Questions as to prior convictions under state or federal law or questions eliciting defendant's admission of committing a prior criminal act are proper for testing the defendant's credibility. *State v. Tharp*, 49 Ohio App. 2d at 295-96. Questions as to prior arrests, indictments or accusations are improper for testing credibility "since arrests, accusations and indictments are not appropriate evidence of the actual commission of a crime which would affect credibility." *Id.* at 295, citing *Wagner v. State*, 115 Ohio St. 136, 152 N.E. 28 (1926); *see also Jones v. Haskings*, 343 F. Supp. 645, 652-53 (S.D. Ohio 1971), *aff'd*, 459 F.2d 479 (6th Cir.), *cert. denied*, 409 U.S. 990 (1972). In situations where the accused denies having committed a prior criminal act and the State offers no impeaching

testimony on that issue, questions as to whether the accused committed a prior criminal act are also improper "since there is nothing to, in fact, establish the commission of a prior offense" and credibility is thus left unchallenged. *State v. Tharp*, 49 Ohio App. 2d at 295.

The limitations placed on cross-examination to test a defendant's credibility rest in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed in the absence of a clear showing that such discretion was abused. *Id.* In the cases where Ohio courts have found no abuse of discretion in admitting such testimony, the trial courts had issued cautionary instructions at the time the evidence was introduced as well as at the close of trial, limiting the receipt of the evidence to the issue of credibility only. *See, e.g., id.* at 298-99; *State v. Patterson*, 43 Ohio App. 2d at 71. The Ohio Court of Appeals has cautioned that the State embarks on the course of introducing prior bad acts "at its peril," and that "the moment the impeachment process by evidence of prior or subsequent offenses passes the fine lien separating the issue of credibility of the witness from the issue of the guilt of the defendant, prejudicial error intervenes." *State v. Patterson*, 43 Ohio App. 2d at 72.

In the instant case. O'Neal's attorney initially attempted to limit O'Neal's direct testimony regarding the East Cleveland matter to establish that O'Neal paid the $6,500 he received from Toney in legal fees and to show that his weapon was registered. However, he than foolishly went on to elicit testimony that O'Neal would not kill someone with a registered weapon. This opened the door for possible cross-examination on this issue.

The door having been opened, the prosecutor burst through it with a salvo of improper questions. He established that the East Cleveland matter was a case in which O'Neal had been accused of shooting Calvin Heinz in the head, and suggested this was the same manner in which he shot Podborny. He then coaxed an admission from O'Neal that it was indeed he who had shot Heinz in the presence of numerous witnesses. He also called a rebuttal witness to establish that O'Neal had admitted shooting Heinz. Finally, he attempted to compensate for the lack of scientific evidence showing the fatal bullet came from O'Neal's revolver by having O'Neal compare the bullet in the instant case to the one in the East Cleveland case.

During the course of this colloquy, the judge continuously overruled objections by O'Neal's counsel. He eventually sustained an objection, but only on the basis that the prosecutor had already made his point. The judge neither considered the relevance of this evidence nor balanced the risk of prejudice in receiving this evidence against its relevance and need. At no time did the judge issue a cautionary instruction or an instruction limiting the questioning to the issue of O'Neal's credibility. Only one such instruction was given, much too late, during the charge to the jury at the close of trial.

Assuming, *arguendo*, that O'Neal's counsel opened the door to the prosecutor's questions about the Heinz shooting, the prosecutor went too far. He suggested to the jury that O'Neal shot Heinz the "same way [he] shot Henry Podborny in the head" and that the Heinz shooting was more than an accident or act of self-defense. This questioning was improper, particularly since the facts of the Heinz shooting had never been determined by a jury.

See State v. Tharp, 49 Ohio App. 2d at 295. While this evidence had minimal relevance to the case at hand, it created a strong risk that the jury would use the evidence of the prior shooting for the improper purpose of finding O'Neal had the propensity to kill Podborny because he had killed another man or would convict him of the instant charges because he had escaped punishment for the prior shooting. *See State v. Curry*, 43 Ohio St. 2d at 68; *cf. United States v. Bakke*, 942 F.2d 977, 981-82 (6th Cir. 1991).

The prosecutor's improper cross examination, therefore, was sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

2. The Prosecutor's Inflammatory Argument Prejudiced O'Neal

We consider the improper argument for two reasons. First, because there is a due process fair trial issue, we must examine the entire trial process for fairness. *Lundy v. Campbell*, 888 F.2d 467, 472 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2212 (1990). Second, the improper arguments are an extension of the improper introduction of inflammatory evidence and the improper cross-examination of O'Neal; thus, they are part and parcel of the issues O'Neal raises.

In their opening and closing arguments, the prosecutors referred to the Heinz killing two times. These references crossed the line separating the issue of credibility from the issue of guilt. *See State v. Patterson*, 43 Ohio App. 2d at 72. On the first occasion, the prosecutor said that

O'Neal's "little problem in East Cleveland" was "in all actuality . . . the killing of another human being." (Tr. 5809). On the second occasion, prosecutor Marino stated:

> [O'Neal] not only lied about being crazy about killing a man with a registered gun, counsel misled you, he further lied about how it occurred. "I hit him on the head and the gun went off." You show me one gun that is fired by hitting someone with the gun. You have to pull the trigger. He is going to complain it is a defective gun. Where is that gun?
>
> * * *
>
> Which of you could shoot me first if I pulled a gun on you? . . . I also wonder about those situations. A guy pulled a gun on me so I shot him. Great.

(Tr. 6087-88). The judge overruled an objection to this argument. The latter statements improperly refer to facts not in evidence. No evidence was introduced on the subject of whether a gun can be fired by hitting a person with it, and no evidence was presented on whether a person could shoot another who had "pulled" a weapon first. The statements carry a great degree of credibility, coming from a state official charged with prosecuting criminal offenses. The jury was likely to accept these remarks as though they were credible testimony. These arguments could only have been intended to support the highly improper suggestion Marino made during O'Neal's cross-examination that O'Neal had intentionally murdered Heinz and thus must have murdered Podborny. The impact of this suggestion was magnified,

because it came in the form of an opinion of a state official charged with the duty of investigating and trying criminal cases.

The prosecutor engaged in further misconduct during his closing argument by using the gruesome evidence of the victim's clothing and wrappings to appeal to the jury's passion:

> You are going to have [Mr. Podborny's] clothes back there. Grab those things, they stink, they've got blood on them. Wrap yourself in that blanket and see what the victim of a murder is like.
>
> * * *
>
> Put a sheet over you, put the plastic over you. I tell you this now because this is what the case is all about.
>
> * * *
>
> As I said, I asked you to do this, to get into the case, to really handle the case. You can always wash up later, folks.

(Tr. 6121-23). The prosecutor's improper reference to the crowbar in closing argument was also inflammatory. He advised the jury to "pick that crowbar up, you get dirt on your hands, you tell me about it." (Tr. 6120-21).

Had the jury followed this argument literally, one can picture the twelve jurors seated around a conference table in the jury room, each wearing an item of the blood-stained clothing the victim was found in, each in turn lifting the crowbar, while viewing the gruesome photographs of the corpse. In this manner, they would deliberate O'Neal's fate. Such appeals to the juror's passions are

unconscionable. They diverted the juror's attention from their task of examining and weighing the evidence objectively, and urged them to convict O'Neal for reasons legally irrelevant to his guilt or innocence. *See United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991). *Cf. State v. Thompson*, 33 Ohio St. 3d 1, 514 N.E.2d 407, 420-21 (1987). Upon studying the closing argument, it becomes clear that the prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case.

The prosecutors' improper arguments, therefore, were sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

VI. The Improper Jury Instructions, Combined With The Prejudicial Trial Errors, Deprived O'Neal Of His Right To a Fair Trial

Although the admission of inflammatory evidence and the prosecutor's conduct at trial was prejudicial to O'Neal, his conviction will be upheld unless the errors, taken as a whole, rendered the trial fundamentally unfair. *See Lundy*, 888 F.2d at 472. Respondent has the burden of proving that the erroneous jury instructions constituted harmless error. *Clark v. Jago*, 676 F.2d at 1105. On the other hand, O'Neal has the burden of establishing that the nonconstitutional trial errors and prosecutorial misconduct amounted to constitutional error. *See United States ex rel. Miller v. Greer*, 789 F.2d 438, 443-44 (7th Cir. 1986) (en banc), *rev'd on other grounds sub nom. Greer v. Miller*, 483 U.S. 756 (1987). *Cf. United States v. Lane*, 474 U.S. 438,

460-61 (1986) (Brennan, J., concurring). He must demonstrate that the errors "tilted the scales in favor of a guilty verdict." *See Webster v. Rees*, 729 F.2d 1078, 1081 (6th Cir. 1984); *see also Walker v. Engle*, 703 F.2d 959, 968 (6th Cir.), *cert. denied*, 464 U.S. 951, 962 (1983). Nevertheless, the erroneous jury instructions may be considered together with the nonconstitutional trial errors to determine whether O'Neal was accorded a fair trial.

We agree with the following statement by Judge Ryan on behalf of the United States Court of Appeals for the Sixth Circuit regarding the elements of a fair trial claim:

> Tomes have been written about the meaning of due process under the fourteenth amendment. But we have searched in vain for any useful, authoritative statement by the Supreme Court, or by the countless other writers who have addressed the subject, defining the elements, the criteria, the immutable components of a fair trial within the meaning of the due process clause of the fourteenth amendment. The accumulated precedent and scholarship on the subject instructs us that procedural due process is, in the last analysis, simply the court's notion of "fundamental fairness," *Rochin v. California*, 342 U.S. 165, 172 (1952), and compliance with the principles "implicit in the concept of ordered liberty."

Lundy, 888 F.2d at 470.

The latest pronouncement on this subject by the Supreme Court indicates that trial errors and "most constitutional errors can be harmless." *Arizona v. Fulminante*, 111 S.Ct. 1246, 1263 (1991). Such errors, which occur during the presentation of the case to the jury, may be

"quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 1264. Other constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* The majority in *Fulminante* considered the latter to be "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 1265. Following *Fulminante*, we must determine whether the prejudicial actions outlined above were "structural defects" in O'Neal's trial or whether they must be analyzed under a harmless error standard.

We seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions.

Relevant factors to consider regarding prosecutorial misconduct are: 1) the degree to which the improper remarks have a tendency to mislead the jury and to prejudice the defendant, 2) whether they were isolated or extensive, and 3) whether they were deliberately or accidentally placed before the jury. *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc), quoting *United States v. Leon*, 534 F.2d 667, 678 (6th Cir. 1976).

The admission of twenty gruesome photographs of the victim and the other inflammatory physical evidence, coupled with the prosecutor's improper arguments regarding such evidence, were designed to influence the jury to convict O'Neal out of sympathy for the victim and passion concerning the nature of the killing as well as to punish O'Neal for the vileness of the deed, rather than on the basis of the evidence. Moreover, the prosecutor's excessive questioning regarding the details of the Heinz killing, coupled with his improper argument concerning that evidence, could have influenced the jury to convict O'Neal solely to punish him for killing another man, thus adding to the possibility that O'Neal was convicted for reasons that had nothing to do with the objective evidence presented regarding Podborny's kidnapping and murder. The prosecutor's prejudicial questions and remarks were extensive rather than isolated. The trial judge's effective endorsement of these actions encouraged the jury to give them their full prejudicial effect.

The obvious purpose and the likely result of such inflammatory evidence and improper arguments was to cause the jury to abandon its impartiality in weighing the evidence. Added to that are the confusing jury instructions and the improper prosecution argument concerning them, which could have led a reasonable juror to conclude that O'Neal could be convicted of each crime absent specific intent, so long as his accomplices had the necessary specific intent. Furthermore, although the Supreme Court has forclosed [sic] this issue as an independent ground for constitutional error, it is important to note that O'Neal was intentionally deprived of the presence of any juror of his race to deliberate his fate.

Following the mechanical approach in *Fulminante* of dividing fair trial issues into two exclusive categories, we believe the circumstances outlined above created a "structural defect" in the trial. To paraphrase the Court in *Fulminante*, in the absence of an impartial jury, " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " 111 S.Ct. at 1265, quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

On the other hand, the Supreme Court's admonition that trial errors and most constitutional errors can be harmless, 111 S.Ct. at 1263, indicates it would be wise to make a harmless error analysis.

Under the harmless error analysis, if review of the entire record reveals that the evidence of guilt is overwhelming, even a substantial error will not transform an otherwise fair trial into an unfair trial because it is likely that the error had little, if anything, to do with the jury's verdict. *See, e.g., Kirby v. Dutton*, 831 F.2d 1280, 1283-84 (6th Cir. 1987); *Webster v. Rees*, 729 F.2d at 1081; *Cook v. Bordenkircher*, 602 F.2d 117, 121 (6th Cir.), *cert. denied*, 444 U.S. 926 (1979). *See also Lundy v. Campbell*, 888 F.2d at 481. The "entire record" refers to all that occurred from the empanelment of the jury to the return of the verdict. *Id.* It includes, among other things, the quality and quantity of the evidence of the defendant's guilt; the extent to which the evidence of guilt was consistent or inconsistent, contradicted or uncontradicted, and clear or vague; the manner in which the evidence was presented; the interest or bias of the witnesses; whether witnesses' testimony was impeached; the extent of defense counsel's objections to

the practices now assailed as unfair; and everything the jury saw and heard, such as legal arguments, objections, evidentiary rulings and the court's instructions to the jury. *Id.* at 472-73. Although reviewing courts cannot know the actual impact the errors had on a jury, they must strive to "evaluate the likely effects . . . , based on reason, principle, and common human experience." *Estelle v. Williams*, 425 U.S. 501, 504 (1976); *see also Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986); *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

At trial, the State introduced the following evidence of O'Neal's guilt.

Toney testified that O'Neal was present at his saloon on January 29, 1981, when she left Mr. Podborny there, according to a prearranged plan. (Tr. 1855-58). She said she waited for several minutes, at which time O'Neal came out and brought her Podborny's keys, wallet and travelers' checks. (Tr. 1859). Toney testified that Allen came from the Saloon, entered the back seat of her car, and said he had hit Mr. Podborny on the legs with a pipe so he could not run. (Tr. 1862). A police officer testified that Allen and O'Neal admitted that Mr. Podborny was brought to O'Neal's place; that he was forcibly restrained at that time; that O'Neal gave Mr. Podborny's personal effects to Toney, who was waiting outside; and that Allen later came out saying he had hit Podborny with a pipe in the legs. (Tr. 4446, 4464-65). They claimed that an unknown black male was involved in apprehending Mr. Podborny. Allen stated that he did not actually strike Mr. Podborny in the legs, even though he acknowledge to Toney that he had, and that when he returned to O'Neal's

bar later that evening, Mr. Podborny was gone. (Tr. 4447, 4460).

Physical evidence admitted at trial tended to show that Podborny was killed in O'Neal's bar. Blood was found on a mirror square, panels, and ceiling tile in the bar. Scientific test results showed that the blood from the panels matched the blood found on the victim's shirt. (Tr. 3684). There was testimony that no more than six percent of the population has that blood type. (Tr. 3685-86). Other tests demonstrated that the manner in which the blood spattered was consistent with Mr. Podborny's height. (Tr. 3693). There was further testimony that paint found on the victim's body was similar to paint from O'Neal's bar in color tint and porosity, although no conclusive match could be made. (Tr. 3653). Finally, O'Neal's counsel conceded in closing argument that Podborny was killed in O'Neal's saloon. (*See* Tr. 5841).

Tape recordings of phone conversations between Toney and Allen, which occurred on March 25, 1981, after Toney had been apprehended and before Allen's arrest, were introduced. In the first conversation, Toney asked Allen to tell O'Neal that "we have got a doctor up here that's going to certify Hank and commit him . . . so it's important that I get him . . . alive." (Tr. 4983). Instead of denying knowledge about Mr. Podborny or his whereabouts, Allen responded by asking, "You need him there?" *Id.* When Toney told Allen that Mrs. Podborny would get everything once Podborny was committed, Allen asked, "It's going to be Dimple's?" (Tr. 4984). Toney responded, "Right. But Hank has to show up, you know." *Id.* At that point, Allen again asked, "You mean you need

him there?" When Toney answered in the affirmative, he said, "Okay. I'll get right to him." *Id.*

In another taped conversation with Toney, Allen asked, "You ain't said nothing about nothing to that doctor, have you?" (Tr. 5006). When Toney told Allen "no," the conversation continued:

> Allen: [D]on't say nothing to him about that.
>
> Toney: What do you mean?
>
> Allen: Uh, about anything. You know, about, you know, that package.
>
> • • •
>
> Toney: Dimple already told the doctor some things and got it all set. . . .
>
> Allen: Oh no. . . .
>
> • • •
>
> Toney: Is he in pretty good condition?
>
> Allen: Yeah.
>
> Toney: Okay. Because you know. . . .
>
> Allen: That package is in good condition.
>
> Toney: Okay. 'Cause if, you know, this doctor, we don't want another witness.
>
> • • •
>
> Allen: Well, sure don't, that's why I said don't say nothing about the package.
>
> • • •
>
> Toney: Is, uh, he on any kind of drugs? 'Cause that doctor can tell. That, you know, the package.

> Allen: Okay. Well, meanwhile until you hear from him, don't do nothing till [sic] you hear from him, okay?
>
> Toney: Uh, Lloyd, it's, it's more money than we ever thought of having.
>
> Allen: 'Cause it'll be best not to even say nothing until and see what he's going to say first. Okay?
>
> Toney: Well, but we'll lose the money if we, if we can't deliver.
>
> Allen: Uh, uh. I know it. But then you know how he is.

(Tr. 5007-12).

Wilbur Higgins testified that, when he visited O'Neal in jail on April 2, 1981, O'Neal said that he and Allen had killed a man and had placed his body in the field next to Higgins' home. (Tr. 3726-27). Higgins testified that O'Neal asked him to go out in the field and cover the body, saying that his life was in Higgins' hands. (Tr. 3726). Higgins said he never went to the field because he did not want to become involved and he notified a city inspector of the body's location two weeks later. (Tr. 3728). Higgins also said that, one night during the winter of 1981, he saw O'Neal and Allen with a car parked at the back of his building. (Tr. 3730). O'Neal told Higgins that he and Allen "had two womans [sic] back there in the car," and asked Higgins "to leave for a while." (Tr. 3730-31). Higgins did not see any women and left. *Id.* The car was parked approximately ten to twelve feet from where Mr. Podborny's body was later found. (Tr. 3733).

Although the evidence against O'Neal was substantial, it was not overwhelming. The testimony of Toney and McLean must be viewed with caution because they were admitted accomplices. *See* Ohio Rev. Code §§ 2923.01(H)(2) and 2923.03(D). Toney's testimony was contradicted by McLean, who provided a radically different version of the events related to him by Toney. The State presented no evidence regarding O'Neal's continuing presence in the saloon where the victim was apparently murdered. O'Neal testified that he had a separate residence and other business investments. Thus, the possibility existed that Podborny could have been murdered in O'Neal's saloon without O'Neal's knowledge. O'Neal denied his alleged oral statement to police, and no written statement existed.

O'Neal's theory at trial was that Toney and Gabbard kidnapped Podborny and murdered him in O'Neal's saloon without O'Neal's knowledge. (Tr. 5840-43). Both Allen and O'Neal testified and denied involvement in the robbery, kidnapping or murder. (Tr. 4868, 4873, 4961). O'Neal denied seeing any blood in his saloon and said he did not know how the blood got there. (Tr. 4898). O'Neal and Allen both testified that Toney had a set of keys to O'Neal's bar. (Tr. 4900, 4902). Allen testified that he was beaten to coerce him to make and sign a statement corroborating Toney's version of the events. (Tr. 4959). Allen also explained that he had trouble hearing Toney in her phone conversations with him and that his impression was that she was referring to O'Neal, "as far as putting him in a hospital for his hernia operation." (Tr. 4947-48).

Most importantly, Higgins' credibility was seriously undermined at trial. O'Neal denied that he told Higgins

he and Allen had killed Podborny and that he asked Higgins to cover the body. (Tr. 4860). On cross-examination by O'Neal's counsel, Higgins stated that he was arrested and held in jail for five hours before he told his story to the police. (Tr. 3758-59). Although Higgins said he decided to talk to the police out of his "own free will" and they did not put words in his mouth, he admitted telling defense counsel in an interview at his home that he signed a statement for the police because they threatened he would be charged with murder if he did not do so. (Tr. 3761, 3776, 3783, 3789).

The above analysis demonstrates that the jury had substantial credibility issues to resolve. The improper instructions on state of mind could have led the jury to convict even if they believed O'Neal's version of events, on the basis that O'Neal had been involved in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to kidnapping, robbery and murder. *See* discussion *supra*, pp. 18-24. The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence, the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improper suggestion that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt. We find it impossible to conclude that these factors "pale into relative insignificance"

in the face of the record evidence of O'Neal's guilt. *See Lundy,* 888 F.2d at 481.

For all these reasons, we conclude O'Neal did not receive a fair trial.

VII. The Failure of the Ohio Court of Appeals to Address an Assignment of Error Deprived O'Neal of Due Process of Law

O'Neal claims that his rights under the fourteenth amendment were violated when the Ohio Court of Appeals failed to address his state law claim that the trial court erred in denying his motion for a separate trial. O'Neal raised that claim as an issue on appeal in his seventh assignment of error.

The first six assignments of error were filed in two separate briefs on July 15 and 26, 1982. (Doc. 10, Ex. D, p.9). On May 12, 1983, O'Neal filed a motion to file a supplemental brief instanter adding the seventh assignment of error. (Doc. 49, App. A-224). That motion was allowed on June 3, 1983. *Id.*, App. A-114. However, in its opinion affirming the trial court's judgment, the Appeals Court did not address the seventh assignment of error. (Doc. 10, Ex. C). Only Judge Stillman addressed the issue in his dissenting opinion. He concluded that the trial court's judgment should have been reversed on the ground that the individual defendants in the Podborny cases should have been tried separately from one another. *Id.*

On July 30, 1985, O'Neal filed a motion for reconsideration requesting the Appeals Court to address the

seventh assignment of error. (Doc. 49, App. A-250). On September 4, 1985, the Appeals Court denied the motion in a two-to-one decision without stating any reasons for the denial. *Id.*, App. A-115. After the Ohio Supreme Court dismissed O'Neal's appeal, O'Neal filed a complaint for writ of mandamus with the Ohio Supreme Court seeking an order requiring the Appeals Court to rule in writing on O'Neal's seventh assignment of error. *Id.*, App. A-217. On April 2, 1986, the Ohio Supreme Court denied the writ without opinion. *Id.*, App. A-278.

Ohio R. App. P. 12(A) provides that "[a]ll errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." As a matter of state law, failure to rule on an assignment of error presented on appeal constitutes reversible error, requiring remand to the Appeals Court for compliance with Rule 12(A). *State v. Jennings,* 69 Ohio St. 2d 389, 433 N.E.2d 157 (1982); *Lumbermen's Underwriting Alliance v. American Excelsior Corp.,* 33 Ohio St. 2d 37, 294 N.E.2d 224 (1973); *Rothfuss v. Hamilton Masonic Temple Co.,* 27 Ohio St. 2d 131, 271 N.E.2d 801 (1971).

The parties have not cited, nor could the Court find, any case addressing the specific issue presented here – whether the failure to rule on an assignment of error presented on appeal, as required by state law, constitutes a violation of the fourteenth amendment. In *Smith v. Lockhart,* 882 F.2d 331, 334-35 (8th Cir. 1989), *cert. denied,* 110 S.Ct. 739 (1990), the Eighth Circuit held that federal habeas relief was not available to a petitioner who claimed that he was denied due process when the trial court violated its procedural rules by denying his motion for post-conviction relief without a hearing and without

making written findings. The court reasoned that there is no constitutional right to state post-conviction review of convictions and that petitioner had not alleged the violation of any constitutional standard which could apply to the state's post-conviction review process in general or to the facts of that case in particular. *Id.* This case is distinguishable from *Lockhart* in that O'Neal claims that he was denied due process based on the failure of the Appeals Court to address a claim on his first appeal as of right.

It is well-settled that the Constitution does not require states to grant appeals as of right to criminal defendants seeking review of alleged trial errors. *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). However, once a state does provide the right to appeal following a criminal conviction, the appeal process must comport with the fourteenth amendment's guarantees of due process and equal protection. *Id.* at 393, 403; *see also Douglas v. California,* 372 U.S. 353, 356-57 (1963); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Under the fourteenth amendment, the State must provide a free transcript of the trial to indigent criminal appellants if that is the only way to assure an adequate and effective appeal. *Evitts,* 469 U.S. at 393, citing *Griffin,* 3511 U.S. at 20. Moreover, a first appeal as of right is not adjudicated in accord with due process if the criminal appellant does not have the effective assistance of counsel or is not provided with an impartial and disinterested tribunal on appeal. *Id.* at 396; *Bradshaw v. McCotter,* 785 F.2d 1327, 1329, *modified on reh'g on other grounds,* 796 F.2d 100 (5th Cir. 1986). A delay in the determination of a direct appeal also may violate the fourteenth amendment guarantees of due process and equal protection. *See Burkett v. Cunningham,* 826 F.2d 1208,

1221 (8th Cir. 1987); *Mitchell v. Zimmerman,* 582 F. Supp. 186, 187 (E.D. Pa. 1984). In addition, the denial of a criminal appellant's request to proceed on appeal *in forma pauperis* may deprive the appellant of his constitutional right to equal protection. *Harris v. Rees,* 794 F.2d 1168, 1175-76 (6th Cir. 1986).

The purpose of a first appeal provided as of right by a state is to determine whether the individual defendant has been lawfully incarcerated and to ensure a correct adjudication of guilt or innocence. *See Evitts,* 469 U.S. at 402; *Griffin,* 351 U.S. at 18-19. By deciding that an appeal is so important that it must be available as a matter of right, the State itself recognizes that the appeal plays such a crucial role that it cannot be decided arbitrarily; nor can the State otherwise deny an appellant fair procedure. *Burkett,* 826 F.2d at 1221, citing *Evitts,* 469 U.S. at 404. Due process concerns are implicated when the State fails to assure a criminal defendant an adequate opportunity to present his claims and to obtain a final determination on the merits of the appeal. *Evitts,* 469 U.S. at 402, 405; *see also Burkett,* 826 F.2d at 1221; *Galloway v. Stephenson,* 510 F. Supp. 840, 842 (M.D.N.C. 1981). Equal protection concerns are implicated when the State treats a class of defendants differently for purposes of offering them a meaningful appeal. *Evitts,* 469 U.S. at 405.

In this case, the Appeals Court essentially deprived O'Neal of a fair opportunity to obtain an adjudication on the merits of his first appeal when it refused to address his seventh assignment of error in accordance with state appellate procedural rules. O'Neal was entitled to a ruling on the seventh assignment of error, particularly in light of the fact that one of the three appellate judges

concluded that the seventh assignment of error merited reversal of O'Neal's conviction. By failing to rule on this arguably meritorious claim, the majority opinion undermined the very purpose of providing a first appeal of right – to assure that the defendant is lawfully incarcerated.

Respondent argued in its memorandum opposing jurisdiction to the Ohio Supreme Court that because the seventh assignment of error was filed in a third filing approximately one year after the initial filings of assignments of error, the Appeals Court either overlooked the claim or deliberately disregarded it as untimely filed. (Doc. 10, Ex. D, p.9). However, even if it was untimely filed, the Appeals Court allowed O'Neal's motion to file a supplemental brief instanter adding the assignment of error, thereby permitting the issue to become part of the record. The Appeals Court could not have overlooked the claim, because one of the judges ruled on it in dissent, and the court denied O'Neal's subsequent motion for reconsideration explicitly seeking a ruling on the seventh assignment of error. Rather, it appears the majority of judges intentionally ignored the claim.

Respondent further argues that O'Neal was not prejudiced by the failure of the Appeals Court to rule on the assignment of error because the issue was addressed by that court in each of O'Neal's co-defendants' cases. (Doc. 59, p.36). However, when a criminal defendant is deprived of his right to a complete and effective appeal, he need not demonstrate that he was prejudiced or that he has arguable grounds for a successful appeal. *Galloway*, 510 F. Supp. at 844, citing *Rodriquez v. United States*, 395 U.S. 327 (1969). "[W]hen the right to appeal itself is lost, the fairness of the proceeding is immediately

impugned, without any further showing of harm being necessary." *Id.*, at 844 n.4; *cf. Mitchell*, 582 F. Supp. at 188.

Accordingly, the failure of the Appeals Court to rule on O'Neal's seventh assignment of error violated O'Neal's right to due process of law under the fourteenth amendment. The remedy for this violation is a fair appellate review of the unaddressed claim, or, if no appellate review is afforded, issuance of a writ of habeas corpus. *See Reynolds v. Lockhart*, 497 F.2d 314, 316 (8th Cir. 1974); *see also Dowd v. Cook*, 340 U.S. 206, 210 (1951).

IT IS THEREFORE RECOMMENDED THAT:

1. O'Neal's petition for writ of habeas corpus be DENIED as to the following claims:

   (a) Claim that O'Neal should not have been tried with his co-defendants;

   (b) Claim challenging the racial composition of the jury.

2. O'Neal's petition for writ of habeas corpus be GRANTED unless respondent retries O'Neal within ninety (90) days of the date of this Court's final judgment, or within such further time as the Court may allow for good cause shown, based upon the following claims:

   (a) Claim of constitutionally defective jury instructions;

   (b) Claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial.

3. In the event the District Judge does not adopt recommendation 2 above, O'Neal's petition for writ of habeas corpus as to the claim of a denial of due process of

law based on the Ohio Court of Appeals' failure to address an assignment of error should be GRANTED. Counsel for O'Neal should be ordered to file a motion to reinstate the appeal with the Eighth District Court of Appeals of Ohio within 30 days of this Court's Order. In the event that the appeal is not reinstated within 60 days of the filing of O'Neal's motion, his petition for writ of habeas corpus should be granted and O'Neal should be released pending further proceedings. The respondent should be ordered to notify the Court in writing upon reinstatement of the appeal and to file a motion to dismiss this action. O'Neal should notify the Court in writing upon expiration of the 60 day period if the appeal is not reinstated.

Date: 1-22-92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL
Petitioner

vs

ARTHUR TATE JR.,
Respondent

Case No.
C-1-86-0976

APPENDIX A
TO REPORT AND RECOMMENDATION

The jury instructions given by the trial court on the offenses charged against O'Neal and his co-defendants, as well as on conspiracy and complicity, are attached in relevant part as follows:

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design. Before you can find the defendants Robert O'Neal, Lloyd Allen, Dimple Podborny guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentleman, that first that Henry Podborny was a living person and that his death was caused by the defendants, or by a conspirator, co-conspirator or one aiding and abetting the defendants. . . .

Secondly, that the killing was done purposely and, thirdly, that the killing was done with prior calculation

and design, and, fourthly, that the act was an [sic] unlawful done willfully.

(Tr. 6158-59).

• • •

Purpose to kill is an element of the crime of aggravated murder. A person act purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the minds of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent Henry Podborny.

The Court in order to assist you in understanding the meaning of purpose or purposeful herein would give you this kind of special – will give you this instruction. Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: As state in the leading case in the matter where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

Although such conspirator, or aider and abettor as a conspirator was neither present [n]or had knowledge of the physical killing, or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain

nature regardless of what the offender intended to accomplish. Therefore, if it is the specific intention and purpose to engage in an act of that nature, then the specific conduct or objective in producing a certain act results or engaged at the time specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

(Tr. 6159-61).

• • •

Now, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life and to inflict great bodily harm, the purpose to, intent to kill may be inferred from the use of the weapon.

(Tr. 6161).

• • •

Now, ladies and gentlemen, the Court will continue to define the various elements and I will define purpose again to robbery and kidnapping in a few moments. Being aggravated robbery and kidnapping, having the elements of purpose, now prior calculation and design is an essential element of the crime of aggravated murder.

Prior calculation and design means that the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reason must have included a little plan involving a study consideration of the method, the means or the instrument which kills another or a weapon used to kill another.

No definite period of time must have elapsed, or no particular amount to consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment or after monetary consideration of the purpose to kill is not sufficient to constitute the crime of prior calculation and design – strike that. Constitute the crime prior calculation, or the prior calculation and design needed to meet the element required for aggravated murder.

If you find from the evidence that the defendant or the co-conspirators, co-conspirator, either individually or co-conspirators, or aider and abettor were actually performing the act to kill and this purpose was arrived at with prior calculation and design before he or she performed the act, that is sufficient for this element of the crime of aggravated murder.

(Tr. 6162-63).

* * *

The Court would indicate at this time in this particular case we have multiple defendants. We have three. And we discussed separating the question of guilt or innocence with each one of these defendants. You must separately consider the elements applicable to each one of the defendants as he or she were separately tried and you must separate it in your finding, as I will explain, to each defendant. You must state your finding to each count separately, also, and to each defendant uninfluenced by the verdict as it relates to the other defendants.

The counts, three separate counts, have to be considered separately. The defendants, each and every one of

them, may be found guilty or not guilty as to any one or all of the charges set forth in the indictment.

(Tr. 6165).

* * *

"No person in attempting or committing a theft offense as defined in Section 2913.01 of the Ohio Revised Code, or in fleeing immediately after such offense, or offenses, shall do either of the following –" And I have paraphrased this, either have a deadly weapon or dangerous ordinance as defined under 2923.11 on or about his person or under his control or in the alternative, inflict or attempt to inflict serious physical harm on another.

The elements briefly, from the definitions are that these defendants, or co-conspirators, or one which you find to be an aider and abettor, inflicts serious harm or attempts to inflict serious harm on another, or in the alternative that the defendant has a deadly weapon or dangerous ordnance on or about his person or under his control and that the defendant was either, in either case, was committing or attempting to commit a theft offense, or anything immediately thereafter of a felony, normally the Court would indicate that the defendants are charged with aggravated robbery.

And before you can find the defendants guilty, you must find beyond a reasonable doubt that on or about the 29th day of January, 1981, here in Cuyahoga County, that the defendants or an aider and abettor or co-conspirator, did obtain or attempt to obtain property of some value,

however small, for the purpose of depriving Henry Podborny of that property and the defendant had a deadly weapon or dangerous ordnance on or about his or her person or under her control. Or in the alternative, you will consider the alternative of serious physical harm, that is the defendants inflicted serious harm upon the person of Henry Podborny.

Now, those are the elements of aggravated robbery conspired in this case.

Now, purpose again is an essential element of the crime of aggravated robbery. Purpose to deprive the owner of his property and to obtain the property is an essential element of aggravated robbery. And once again a purposeful act, purposely is the specific intention to obtain certain results. And in this case it must be established at the time in question there was intent in the mind of the defendants and/or co-conspirators, or aiders and abettors in complicity, a specific contention to obtain the property of Henry Podborny.

Now to determine the purpose from which the person acts, does an act or brings about a specific result, is determined by the manner in which it is done, the means or weapon used and the weapon used and all other facts and circumstances in evidence. As to the issue – as to the issue, rather, of a deadly weapon or dangerous ordnance, a deadly weapon, I have explained it one way. There is another way to explain it.

(Tr. 6165-68).

* * *

Deadly weapon is an object or instrument also of such size and weight and of such design and shape that it may be grasped in the hand in such a way that it may be used upon or directed against the body of another in a manner with such force to injure or kill the other – another person.

(Tr. 6168-69).

* * *

In conclusion, the Court would indicate to you as it relates to count number two, aggravated robbery. If you find that the State of Ohio has proven each and every essential element of the crime of aggravated robbery as against the defendants, those who you find as co-conspirators, or aider and abettor, in that on January 29th, you found that they did unlawfully and purposely did in attempting to commit a theft offense as defined in 2913.01 and a theft offense, robbery is a theft offense, stealing is a theft offense.

In committing a theft offense, or in attempting to commit, fleeing thereafter, such offense upon Henry Podborny the defendants did have a deadly weapon or dangerous ordnance, to wit, a gun as alleged in the indictment, a gun on or about his person or under their control or if you find beyond a reasonable doubt in the alternative that on or about the 29th day of January, the defendants or co-conspirators or aiders and abettors or persons acting in concert with them unlawfully and purposely in attempting to commit a theft offense or in fleeing immediately after such attempt or offense upon Henry Podborny did inflict or attempt to inflict serious physical harm upon Henry Podborny then you should

find the defendants guilty in the aggravated robbery, second count.

(Tr. 6170-71).

* * *

Now, the third count in this case involving kidnapping under 2905.01. And that statute reads as follows:

"No person by force, threat or deception or by any means shall remove another from the place where he is found, or restrain him of his liberty for any of the following purposes," and the purposes alleged in this statute that are alleged in the indictment are as follows: To facilitate the commission of any physical, any or, flight thereafter. That's under two of the statute.

Three, to terrorize or inflict serious harm on the victim or another. Therefore, you have these several elements as follows, it [sic] wit, one, that the defendant removes another, defendants, and when I say defendants I'm talking also about co-conspirators and aider and abettors, the defendants removed another from a place where he is found. And the defendants restrained another of his liberty and, two, that the means of removal or restraint is by either force, threat or deception. And, three, that the defendants purpose is to facilitate the commission of any felony or flight after the commission of a felony or in the alternative it is an either-or situation, again, is to terrorize the victim or to inflict serious physical harm to the victim.

That's the short form. I believe short-long all the way through here because that's the short form of what the State has to prove under the kidnapping statute before

you can find the defendants herein, that is Gail Robert O'Neal, Lawrence O'Neal, Lloyd G. Allen, Dimple Podborny, guilty of kidnapping of Henry Podborny, you must find that beyond a reasonable doubt that on or about the 29th day of January, 1981, and in Cuyahoga County, Ohio, that the defendant, co-defendants, conspirators, rather aider and abettors, in complicity removed Henry Podborny from the place where he was found or restrained Henry Podborny of his liberty for the purpose of facilitating the commission of a felony or flight thereafter or in the alternative terrorize him or in the alternative to inflict serious physical harm on Henry Podborny and that such acts were accomplished by force, threat or deception.

That's if you find beyond a reasonable doubt in respect to Henry Podborny that he was removed from the place where he was found or restrained from liberty for the purpose of facilitating a felony or flight thereafter, or in the alternative to terrorize or separate, alternate to inflict serious harm to a defendant and that such removal was accomplished either by force, threat of force, deception then the defendants would be guilty of kidnapping under 2905.01.

On the other hand, if the State failed to prove any one of these essential elements of the crime of kidnapping, I repeat it, then you would find them not guilty.

(Tr. 6171-74).

* * *

Therefore, you have to determine these facts from the facts and circumstances in evidence. Whether or not the defendants or co-conspirators or aiders and abettors had

the purpose in mind, either to commit a felony or facilitate the flight from the commission of a felony, or to otherwise have the purpose in mind to terrorize Henry Podborny, or otherwise had the purpose in mind to inflict serious harm on Henry Podborny, such as injury or death.

Now, in conclusion as it relates to kidnapping, if you find every essential element of kidnapping, that is the defendant, co-conspirators or person in concert or aider and abettors, did unlawfully and by force, threat or deception remove Henry Podborny from the place where he was found and restrained him of his liberty for the purpose of facilitating a felony, or flight thereafter, or in the alternative that they did for terrorizing or in the alternative for inflicting serious harm on Henry Podborny and failed to release him, the victim, in a safe place unharmed, then you must find the defendants guilty as charged in the indictment.

(Tr. 6176-77).

* * *

Now, ladies and gentlemen, I have indicated earlier that I would explain what is meant by conspiracy, aiding and abetting and complicity in this case. You will be called upon to decide from the evidence whether or not the State of Ohio has proven a conspiracy beyond a reasonable doubt among the defendants and the other co-conspirators. The Court would appoint [sic] out that the defendants have not been charged in this indictment under our conspiracy statute 2923.01, but have been charged in this particular case, the State of Ohio, theory of the case appears to be buttressed to their aiding and abetting or conspiracy. The central issue of concern is as

follows, one, has the State proven an agreement, a scheme or plan that was participated in by the defendants in this particular case, in a conspiracy intent, the element of the offense, conspiracy, is however more complex because it involved two elements of intent that shade with each other, each party, must have intended to enter into the agreement and scheme and they must have a common intent to commit an unlawful act.

Second issue, factual issue for you is whether or not the State has proven there was a concerted action by and between the defendants, or with other indicted or other unindicted co-conspirators. This you have to determine from the evidence.

Three, whether or not the defendants herein, either or all of them, or some or none of them, have aided or adjoined, aider or abettor, or joined in, in a conspiracy or existing conspiracy. To this extent the Court would indicate that the conspirator rule applies, if four conditions are established, one, that there is an attempt between the parties, two, that the particular defendants participation in the conspiracy, that is the defendants intended to commit and engage in criminal activity and, three, that the particular defendants participation was performed during the course of the conspiracy and, four, that the particular defendants participation was inference of the conspiracy, that is, there was a substantial overt act committed in furtherance of an illegal purpose.

Now, you should consider further whether or not the State has proven that each one of these defendants, that is Robert O'Neal, Lloyd B. Allen and Dimple Podborny, engaged in a conspiracy by committing an overt act in

furtherance of an agreement between them, with the Court now defines and tells you what an overt substantially – tells you about that.

What is a substantial overt act in furtherance of a conspiracy? An overt act is substantially when it is of such character as to manifest a purpose on the part of the actor, in this case, the defendants, that is any of these defendants, that the objective of the conspiracy should be completed. Conspiracy, ladies and gentlemen, is the plan or aiding in or planning with other, or agreeing with another person that one or more of them will engage in a conduct with the purpose to commit or facilitate and/or promote the commission of a specific offense.

Therefore, a conspiracy is an undertaking or an agreement by one or more persons to carry out a common objective to commit, promote, or to facilitate a criminal act.

The existence of undertaking or agreement may be shown either by that direct evidence or by inferences from facts or circumstances in evidence, that is circumstantial evidence. Now the reason for the use of facts and circumstances and inferences, probably has been gathered from the facts that conspirators usually and generally are not open. And conspirators usually don't meet in one place and at one time.

There are various stages of a crime. There is a planning stage, there is a perpetrator who may require him before the crime to assist in planning it during the course of the crime until activity to aid in the commission of it, or in escaping from the scene, or after the defendants completed it or conceal or assist in evading answers, or

protect or concealment of loot and the evidence against them.

Therefore, conspiracies are not really easily identifiable and hence the use of inferences and circumstantial evidence is allowed. Those who associate to perform the criminal act or know or share the objective and participate to some extent are bound by the acts of anyone, any one of their number, in carrying out the purpose of the conspiracy.

You may not consider the acts and statements of anyone against another unless the existence of the agreement and understanding to commit the criminal act is substantiated by the state beyond a reasonable doubt. The defendant cannot be convicted of a conspiracy unless substantial overact [sic] in the furtherance of the conspiracy is proved that – pardon me. Is proved to have been done by he or she, or by a person with whom he or she conspired and that such act was performed subsequent to the defendant's entrance into the conspiracy.

An overt act is substantial when it is of such character to manifest the purpose on the part of the actor, that is, the defendant, that the object of the conspiracy can be completed.

As to unidentified co-conspirators, or co-confidants, the Court would indicate that if the defendants know, or had reasonable cause to believe that a person with whom he or she converses, or has also conspired or was conspired with another person to commit the same offense, then that defendant is guilty of conspiring with such other person who's either co-conspirator or aider and abettor even though the identity of the other person was

unknown to the defendants O'Neal and Allen and Podborny.

Ladies and gentlemen, a co-conspiracy terminates when the offense or offenses are committed, or when it is abandoned by all conspirators. A conspiracy remains in existence during such a period as the conspirators are concerned with the concealment of their criminal conduct as I have indicated earlier, as the testimony of the conspirator. The law of the State of Ohio is that no person shall be convicted on a conspirator's testimony unsupported by other evidence.

The Court will speak further on this matter at length.

The Court has mentioned the word complicity. Conspiracy and complicity are two separate and distinct legal theories.

Also complicity a person who aids or abets in conspiracy can be a co-conspirator, complicity in law means the conduct of one who purposely participates with another as a partner or accomplice for the purpose of committing a crime. The law in Ohio on aiding and abetting or complicity is that a person who knowingly aids or assists another in the commission of a crime is just a guilty as if he personally performed every act constituting the crime.

I'm speaking of aiding and abetting now. When two or more principals have a common purpose to commit a crime and one does one part and the second performs the other part, those acting together are equally guilty of the crime.

Further, where two or more persons have a common purpose to commit a crime and wherein a continuing sequence over events other crimes are committed, all of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed.

This is the law in aiding and abetting or in complicity.

The mere fact that a person, as the same law, as aiding and abetting, the mere fact that a person is present when a criminal act is presented does not make him an aider and abettor unless he does some overt act in furtherance of the crime charged in the indictment.

Now, such persons under the law of complicity as distinguished from co-conspirators, such persons are regarded as if they were the principal offender and are just as guilty as if he or she performed each act constituting the offense. This is true even though they weren't physically present when the act was performed.

It is the law of Ohio when two or three persons have a common purpose to commit a crime and one does a part and second does another act, together those acting together with the purpose required for the commission of a crime, that is the purpose required for aggravated murder, aggravated robbery and kidnapping as it relates in this case, are equally guilty of the crime. And the Court instructs you as a matter of law in Ohio that an aider and abettor can be also found as to be a co-conspirator.

The Court has instructed you as to the offense of aggravated murder, aggravated robbery and kidnapping. Further – period. Okay.

Further you will decide whether or not in this case the defendants assisted, or encouraged or directed or associated themselves with one another for the purpose of committing those offenses respectfully by, or consideration of the evidence.

Again, once again a person cannot be convicted – rather, no person can be convicted of these offenses, aiding and abetting, solely on the testimony of conspirators, solely on the testimony of accomplices unsupported by other evidence.

The Ohio Rules require even in conspiracy as well as the declarant that the defendants participation must be established upon independent proof of the conspiracy, such corroboration must come from evidence in the case aside from the testimony of her co-conspirators.

This consideration applies even with regard to the proof of the existence of the alleged conspiracy.

Corroborative evidence is evidence of some act of fact related to the offense, which if believed by itself and without any aid, interpretation or direction from the testimony of a co-conspirator then connects the defendant to the commission of the offense charged. It is not, however, necessary that the corroborative evidence be such in itself to establish every element of the offense charged now, and that it corroborate every fact to which a co-conspirator testifies.

Mere similarity of conduct among the various persons and the fact that they have been associated with

each other and may have assembled together and discussed common aims and interest does not necessarily establish proof of the existence of the conspiracy. However, in this case the evidence in this case need not show that the member of the conspiracy entered into any express or formal agreement, or that they directly by words spoken, or in writing, stated between themselves with the objective or purpose was to be, or details thereof, or expressed means by which the means of the objective or purpose was to be accomplished.

What the evidence in this case must show though beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that the member of the conspiracy in some way or manner and through some contrivance positively, or tacitly, orally, written, expressly or impliedly, confederated, together, combined and agreed, that is, came to a mutual understanding to try to accomplish a common and unlawful crime.

The evidence in this case must establish beyond a reasonable doubt that the alleged conspiracy was purposely formed and each defendant here and purposely joined and participated in the plan intended in advance and further some object or some conspiracy in which one may become a member of a conspiracy without full knowledge of the detail to have a conspiracy.

On the other hand, a person who has not knowledge of the conspiracy, but has to ac [sic] tin [sic] a way which further some object or purpose of the conspiracy, thus not thereby become a conspirator. To act or participate purposely means to act or participate voluntarily and intentionally in an unlawful enterprise and with the special

intent to do something that the law forbids because of a certain unlawful result which was the subject of the agreement.

Thus, if any of the defendants purposely agreed to enter into a conspiracy, or joint venture to accomplish an unlawful objective, if you find that such defendants were co-conspirators or aider and abettors in complicity and in a substantial overt act in furtherance of an alleged conspiracy is proven beyond a reasonable doubt to have been done by this person, by him or her, and/or by a person or by a person with whom he conspires and that such act was performed subsequent to the entry of the defendant into the conspiracy, such defendant properly should be considered a co-conspirator.

An overt act is substantially once again, when it is of such a character as to show a purpose on the part of the actor that the object of the conspiracy should be completed. An overt act is any act purposely committed by one of the conspirators, or co-conspirators an effort to accomplish some objective or purpose of the conspirator – conspiracy. An overt act need not be criminal in nature if conspired separately and apart from the conspiracy. It may be an act which taken alone by itself is innocent. It must, however, be an act which follows, intents towards the accomplishment of the plan or scheme. It must be purposely done in furtherance of some object or purpose of the conspiracy.

If it is established beyond a reasonable doubt that a conspiracy existed in this case, an act, a declaration, then the acts and declarations of any of the co-conspirators are chargeable against any – are chargeable against and may

be considered with respect to each other co-conspirator with respect to each other co-conspirator as though the act of declaration was such – was made by co-conspirator – strike that – the word I think I have – Let's take that over.

If it is established beyond a reasonable doubt that a conspiracy existed, the act or declaration of a co-conspirator are chargeable against and may be considered with respect to each of the co-conspirators as though it was the act or declaration of such co-conspirators. Each co-conspirator act as an agent of the other.

The defendant cannot be bound by the acts or declarations of the other participant until it is established beyond a reasonable doubt that the conspiracy existed and that he was one of the members of the conspiracy.

Now, ladies and gentlemen, in conclusion the Court in summary would indicate that where two or more persons are associated in the same illegal purpose, any act or decision made by one of them with reference to the common objective and done, or said during the life of the conspiracy, may be given in evidence even where the indictment does not charge a conspiracy as such. A conspirator in effect is an agent for each of the other co-conspirators during the life of the conspiracy and as such any statements made or acts done by him in furtherance of the general plan and during the life of the conspiracy is admissible against the co-conspirator. And such declarations may also be testified by such person. And this is an exception to the so-called hearsay rule. It is not necessary that the conspirator be the one that commit the identical offense charged in the indictment or even a

similar one. It is enough that the offense charged in the indictment was one that might have been contemplated as a result of the conspiracy.

And I made reference, when I started in the defining of purpose, I explained that during that course of defining purpose.

Finally, the Court would indicate that when an offender knows or has reason to believe, reasonable cause to believe to be with a person with whom he conspired and is also conspired with another to commit the same offense, the offender is guilty of conspiring with such person even though that person's identity may be unknown to the offender.

Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them the aider and abettor in conspiracy with each other is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the – in furtherance during the time of the conspiracy. This is the law of Ohio.

These are matters, ladies and gentlemen, concerning aiding and abetting and conspiracy that you may consider and you may arrive at out of the evidence before you.

Now, before you can render a verdict of guilty on the main charges herein, that is aggravated murder, robbery – aggravated robbery, and kidnapping, you must decide

from the evidence beyond a reasonable doubt that the defendants either entered into a conspiracy as defined 'o you at length here, or in the alternative found to be aiders or abettors in complicity as found here, or have individually been proven guilty beyond a reasonable doubt by the State of Ohio of the charges before this Court, that is, aggravated murder, aggravated robbery, and kidnapping.

On the other hand, if the State failed to prove any one of the essential elements of those three crimes, statutory crimes, these defendants should be found not guilty.

Now, ladies and gentlemen, once again I will repeat in this particular case we have multiple counts and multiple persons being charged. If you find that the State has proven beyond a reasonable doubt all of the essential elements of any one or more of the crimes charged in the various counts of the indictment, then your verdict must be guilty as to such crime or crimes according to your finding. If you find, on the other hand, that the State has failed to prove beyond a reasonable doubt any one of the essential elements, or any one or more of the crimes charged in the separate count of the indictment, then your verdict must be not guilty.

Once again, the charges as set forth in each count and the charges constitute separate and distinct matter, you must consider each count and the evidence applicable to each count separately and you must consider and separate your finding to each count uninfluenced by your verdict as to the other counts and other defendants. Each defendant may be guilty or not guilty, not guilty or guilty, of any one or all of the crimes charged.

As to the counts, you have multiple counts and you must decide as to the guilt and innocence of each one of these three defendants here as if they were tried separately and if you cannot agree on a verdict as to each – all of the defendants, or you agree as to one or more, you must render your verdict as to that one or more whose guilt you agree on, or innocence you agree on. And you must separately consider the evidence applicable to each of the defendants as though there were three separate trials and consider your finding as to each defendant uninfluenced by your verdict as to the other defendant.

(Tr. 6177-95).

-END-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

v.

TERRY L. MORRIS,

Respondent

C-1-86-976

(Filed April 15, 1992)

ORDER

This matter was referred pursuant to 28 U.S.C. § 636 to the United States Magistrate Judge for Report and Recommendation on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254. The matter is before the Court upon the Report and Recommendation of the Magistrate Judge (doc. no. 68) recommending that the Petition for Writ of Habeas Corpus be denied as to certain claims and granted as to certain claims; upon respondent's objections thereto (doc. no. 69), which were not timely filed; petitioner's Motion to Strike Objection (doc. no. 70); petitioner's response to respondent's objections (doc. no. 71); and petitioner's motion for Bail and Suspension of Execution of Sentence (doc. no. 72).

The respondent failed to file his objections in a timely fashion and failed to serve the petitioner with a Motion for Extension to File Objections.

The respondent has not responded to the petitioner's Motion to Strike the Objections of the Respondent.

Upon careful consideration of the matters before the Court, and upon conducting a *de novo* review of the record, the Court finds that the Magistrate Judge's conclusion that petitioner's convictions are supported by substantial but not overwhelming evidence should be adopted (doc. no. 68, p. 47).

Accordingly, the Court accepts the factual findings of the Magistrate Judge and hereby **ADOPTS IN PART AND INCORPORATES** into this Order by reference his Report and Recommendation dated January 22, 1992 that O'Neal's Petition for Writ of Habeas Corpus be **DENIED** as to the following:

(a) O'Neal's claim that he should not have been tried with his co-defendants;

(b) O'Neal's challenge to the racial composition of the jury.

As to O'Neal's Petition for Writ of Habeas Corpus based on the claim of constitutionally defective jury instructions and the claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of the fundamentally fair trial, the Petition for Writ of Habeas Corpus in **RECOMMITTED** to the Magistrate Judge for reconsideration in light of the doctrine espoused in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims. The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and the commentary thereunder, a copy of which is attached. This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon

the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

In light of the above, the Court further **ORDERS** that petitioner's Motion for Bail and Suspension of Execution of Sentence (doc. no. 72) is **REFERRED** to the Magistrate Judge pursuant to Rule 10, Rules Governing Section 2244 Cases in the United States District Courts, and 28 U.S. C. § 636(b); and petitioner's Motion to Strike Objection (doc. no. 70) is **GRANTED,** since respondent failed to respond to the Motion to Strike, failed to file timely objections, and failed to file a timely motion for an extension of time in which to file objections to the Report and Recommendation.

IT IS SO ORDERED.

/s/ H J Weber
Herman J. Weber, Judge
United States District Court

3.10

PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) Count ___ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule

that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count ____ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the

crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

Use note

This instruction should be used when the government is attempting to convict a defendant of a substantive crime committed by other members of a conspiracy, and there is also some evidence that the defendant personally committed or participated in the commission of the substantive offense.

The language in paragraph (2) should be modified to delete all references to personal commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

Committee Commentary 3.10

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory, and some evidence that a defendant personally committed or participated in a substantive offense.

In *Pinkerton v. United States*, 328 U.S. 640, 645-648, 66 S.Ct. 1180, 1183-1185, 90 L.Ed. 1489 (1946), the Supreme Court held that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner [committed in furtherance of the conspiracy] may be the act of all." Accord *United States v. Martin*, 920 F.2d 345, 348 (6th Cir.1990) ("The *Pinkerton* doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy.") *United States v. Adamo*, 742 F.2d 927, 943-944 (6th Cir. 1984) ("Once a person becomes a member of a conspiracy, he or she may 'be held responsible for all that may be . . . done' by co-conspirators."), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); *United States v. Chambers*, 382 F.2d 910, 914 (6th Cir.1967)) ("Where the substantive offense is committed by one or more conspirators in furtherance of an unlawful activity, all members of the conspiracy are guilty of the substantive offense.").

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, see, e.g., *United States v. Cimini*, 428 F.2d 129, 130 (6th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), that authority is questionable in light of the United States Supreme Court's decision in *Levine v. United States*, 383 U.S. 265, 266-267, 86 S.Ct. 925, 925-926 15 L.Ed.2d 737 (1966). In *Levine*, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of . . . the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton, supra*, 328 U.S. at 647-648, 66 S.Ct. at 1184-1185. In *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir.1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 464, 27 L.Ed.2d 452 (1971), the Sixth Circuit treated this statement from *Pinkerton* as creating three separate limitations on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. *Cf. United States v. Frost*, 914 F.2d 756, 762

(6th Cir.1990) ("[A] court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In *Pinkerton*, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." *Id.*, 328 U.S. at 646-647, 66 S.Ct. at 1183-1184. And in *Etheridge*, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. *Id.* 424 F.2d at 965.

In *United States v. Borelli*, 336 F.2d 376, 385-386 (2d Cir. 1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir.1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it". See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 n. 36, 98 S.Ct. 2865, 2886 n. 36, 57 L.Ed.2d 854 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated

in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

vs.

CASE NO.
C-1-86-0976

TERRY MORRIS,

Respondent

NOTICE

Attached hereto is the Supplemental Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on May 11, 1992. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to

Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

vs.

Case No.
C-1-86-0976

TERRY MORRIS,

Respondent

SUPPLEMENTAL REPORT AND RECOMMENDATION

Petitioner Robert Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 22, 1992, we issued a report and recommendation recommending that the petition be denied with respect to two of O'Neal's claims for habeas corpus relief and granted with respect to his claims that jury instructions were constitutionally defective and that prosecutorial misconduct and erroneously admitted evidence deprived him of a fundamentally fair trial. (Doc. 68).

On April 15, 1992, the district court judge issued an order adopting the portion of the report and recommendation recommending denial of two of O'Neal's claims for habeas corpus relief. (Doc. 73). The Court also adopted our conclusion that "petitioner's convictions are supported by substantial but not overwhelming evidence." *Id.* at 2. However, the Court ordered the petition recommitted to the undersigned Magistrate Judge for reconsideration of O'Neal's claims of constitutionally defective jury instructions and that he was deprived of a fair trial because of prosecutorial misconduct and erroneously admitted evidence "in light of the doctrine espoused in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims." *Id.* The Court further stated:

> The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and the commentary thereunder. . . . This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

Id. at 2-3.

The *Pinkerton* doctrine relates to O'Neal's claim that the jury instructions wre constitutionally defective because they relieved the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. In our previous report and recommendations, we found that the instructions were confusing

because they failed to set forth the state law requirement that each defendant have the independent intent to commit the offenses charged in order to be found guilty. (Doc. 68, p. 21). We concluded that the erroneous instructions constituted a due process violation because a reasonable juror could have interpreted them to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the requisite intent of other participants in the alleged conspiracy. *Id.* at 24.

In *Pinkerton*, the Supreme Court held that a defendant can be convicted of the substantive offenses charged against him, even though there is no evidence to show that he participated directly in the commission of the offenses, if it is found that he was a party to an unlawful conspiracy at the time the offenses were committed and the offenses charged were in fact committed in furtherance of the conspiracy. 328 U.S. at 645-47. The Court reasoned:

> Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Yet all members are responsible, though only one did the mailing. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which

> holds responsible one who counsel, procures, or commands another to commit a crime is founded on the same principle.

Id. at 647 (citations omitted). The Court refused to extend its holding to situations where the substantive offense committed by a co-conspirator "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48.

Section 3.10 of the Sixth Circuit's Pattern Criminal Jury Instructions is based on the *Pinkerton* case. Under this section, a defendant can be found guilty of substantive offenses committed by others if the government proves beyond a reasonable doubt that the defendant was a member of an unlawful conspiracy; that while he was a member of the conspiracy, one or more of the other members committed the substantive offense; that the offense was committed to help advance the conspiracy; and that the offense was within the reasonably foreseeable scope of the conspiracy. The instruction provides: "This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understands it."

Under Ohio's complicity statute, which provides the statutory basis for the charges against O'Neal on the theory of his participation as an accomplice or co-conspirator, aiders

and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. Ohio Rev. Code § 2923.03(A); *see also State v. Lockett*, 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds*, 438 U.S. 586 (1978). In Ohio, a defendant cannot be convicted of aggravated murder solely because he engaged in a felony that resulted in a murder; rather, the prosecution must prove a defendant's purpose to kill as an essential element of the offense even in cases where it proceeds on a complicity theory. *State v. Scott*, 61 Ohio St. 2d 155, 166 (1980); *see also Clark v. Jago*, 676 F.2d 1099, 1103-04 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984). The prosecution may prove intent to kill either by producing direct evidence of intent or by showing that the participants in a felony entered into a common plan and the aider and abettor or co-conspirator knew either that a dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment was reasonably likely to produce death. *Scott*, 61 Ohio St. 2d at 165; *Lockett*, 49 Ohio St. 2d at 59-60. As in *Pinkerton*, this means that under Ohio law intent to kill can be inferred from the existence of a criminal conspiracy where a homicide could reasonably be foreseen as a natural consequence arising from the furtherance of the conspiracy. *See Lockett*, 49 Ohio St. 2d at 60-62. For example, evidence that a defendant participated in the planning and commission of an armed robbery, where it is reasonably foreseeable that the victim's life would be endangered, is sufficient to establish intent to kill. *Lockett*, 49 Ohio St. 2d at 62. On the other hand, a jury instruction which would permit a defendant to be found guilty of aiding and abetting a murder solely based on evidence that he was implicated in the victim's kidnapping improperly relieves the State of its

burden of proving intent to kill. *Scott*, 61 Ohio St. 2d at 166-67.

In this case, the jury instructions on the intent element of the offenses charged and the complicity theory of liability were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to O'Neal as a participant in a conspiracy, even if the offense was not within the reasonably foreseeable scope of that conspiracy as required under *Pinkerton* and Ohio case law. In instructing the jury on the intent element of the substantive offenses of aggravated murder, kidnapping and aggravated robbery, the court often referred to "the defendants or co-conspirators or aiders and abettors" as a group, without explicitly setting forth the intent required of each defendant individually either as a direct participant in the offense or as a participant in a conspiracy. (*See* Doc. 68, App. A, pp. 2, 5, 8). In addition, the court never instructed the jury that in order to find the individual defendants guilty of the substantive offenses under a conspiracy or complicity theory, it had to find that the offenses could reasonably be foreseen as necessary or natural consequences of the conspiracy. *See id.* at 9, 14, 16. Indeed, the court instructed the jury on conspiracy and complicity only in general terms, without discussing the separate offenses charged or the scope of the conspiracy alleged against defendants. *See id.* at 8-16.

Therefore, without further explanation, a reasonable juror could have concluded that O'Neal could be found guilty of the crimes of kidnapping, robbery and murder simply based on his participation in a conspiracy to obtain money from either Mrs. or Mr. Podborny that

eventually led to the commission of the offenses. Also, a reasonable juror could have interpreted the instructions to mean that if O'Neal were found to be a member of a kidnapping conspiracy, he could be found guilty of aggravated murder resulting from the kidnapping even if the murder was not within the reasonable contemplation of the participants in the kidnapping scheme. *Cf. Scott*, 61 Ohio St. 2d at 166-67.

The instructions as a whole were insufficient to dispel the possibility of juror confusion. When instructing on the intent element of aggravated murder, the court stated on one occasion:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: . . . where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

(Doc. 68, App. A, p. 2). This instruction, which was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations, properly sets forth an appropriate method for inferring an accomplice's or co-conspirator's intent to kill based on his participation in a conspiracy. *See Scott*, 61 Ohio St. 2d at 165; *Lockett*, 49 Ohio St. 2d at 59-60.

However, no such instruction was given regarding the requisite intent of an accomplice or co-conspirator on the other charges of aggravated robbery and kidnapping. Moreover, the instruction was stated in pro-prosecution terms of a finding of a guilt. The court gave no further instructions to emphasize to the jury that before it could find the defendants guilty of aggravated murder based on their participation in a conspiracy, it had to find that the unlawful object of the conspiracy and the manner of its accomplishment was reasonably likely to produce death.

The instructions given on complicity and conspiracy further confused matters because the court never stated that the substantive offense had to be a reasonably foreseeable consequence of the conspiracy before the jury could find the defendants guilty of the offense solely because of their participation in the conspiracy. The court did not list "reasonable foreseeability" as a condition for finding co-conspirator liability. (*See* Doc. 68, App. A, p. 9). Moreover, without mentioning the reasonable foreseeability component, the court stated: "Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them . . . is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the – in furtherance during the time of the conspiracy." *Id.* at 16 At one point in these instructions, the court made the vague statement that "[i]t is enough that the offense charged in the indictment was

one that *might* have been contemplated as a result of the conspiracy." *Id.* at 15 (emphasis added).

As discussed in the previous report and recommendation, the risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's misstatement of the law in his closing remarks, which was effectively endorsed by the trial judge when he overruled defense counsel's objections to the remarks. (*See* Doc. 68, pp. 23-24). The prosecutor's comments improperly suggested to the jury that all that was necessary to establish guilt for the crimes charged was proof "that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes." (Tr. 6075-76).

Accordingly, the doctrine espoused in *Pinkerton* does not change our conclusion in the previous report and recommendation that the jury instructions on the intent element of the crimes charged constituted a violation of O'Neal's right to due process of law.

In any event, assuming, *Arguendo,* that the jury instructions were not constitutionally defective, we would still recommend a finding that O'Neal was deprived of a fair trial based on the prosecutor's misconduct and the erroneously admitted evidence. We view the prosecutor's misconduct and the admission of inflammatory evidence as far more egregious errors than the confusing jury instructions. As we stated in the previous report and recommendation, "[w]e seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary

and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions." (Doc. 68, p. 42).

The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. *See id.* at 30-39. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the express purpose of inflaming the jury's passions. *See id.* at 28-30, 39-40. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. *Id.* at 47-48. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

Date: 5-8-92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States
Magistrate Judge

cbc

United States District Court

SOUTHERN DISTRICT OF OHIO

ROBERT O'NEAL	JUDGMENT IN A CIVIL CASE
V.	
TERRY MORRIS	CASE NUMBER: C-1-86-976

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED.**

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED**. The State of Ohio or the county of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

This case is **DISMISSED** and **TERMINATED** on the docket of this Court.

July 27, 1992
Date

KENNETH J. MURPHY
Clerk

/s/ D. A. Myers
(By) Deputy Clerk D. A. Myers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

v. C-1-86-976

TERRY MORRIS,

Respondent

ORDER

Petitioner Robert O'Neal brings this action through court-appointed counsel for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges the constitutionality of his convictions by a jury in the Cuyahoga County, Ohio Court of Common Pleas for aggravated murder, kidnapping, and aggravated robbery. This matter is before the Court upon a Report and Recommendation and a Supplemental Report and Recommendation of the Untied States Magistrate Judge (doc. nos. 68, 74), respondent's objection (doc. no. 76), petitioner's response (doc. no. 79), petitioner's motion for bail (doc. no. 72), and a pretrial services report (doc. no. 77).

I.

The Magistrate Judge recommends that this Court issue a writ of habeas corpus on the ground that O'Neal was not provided a fundamentally fair trial due to the constitutionally defective jury instructions, the prosecutor's

prejudicial misconduct, and the admission of certain prejudicial evidence.[1]

Upon a *de novo* review of the record in light of respondent's objections, the Court finds that respondent's contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court. The Court finds that the Magistrate Judge accurately set forth the controlling principles of law and properly applied them to the particular facts of this case and agrees with the Magistrate Judge that petitioner was deprived of a fundamentally fair trial in violation of his rights under the Due Process Clause.

Accordingly, the Court hereby **ADOPTS** the Report and Recommendation and the Supplemental Report and Recommendation of the United States Magistrate Judge (doc. nos. 68, 74).

II.

Petitioner seeks an order directing the state to release him on bail and suspend the execution of his sentence (doc. no. 72). He argues that release on bail is proper because the violations of his constitutional rights during

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[1] The Magistrate Judge also recommends that in the event this Court does not adopt these recommendations, this Court should grant a writ of habeas corpus on petitioner's claim that he was deprived of his rights under the Due Process Clause during his state appeal of his convictions. Given this Court's agreement with the Magistrate Judge's primary conclusions, there is no need to reach petitioner's claim that he was deprived of due process during his state appeal.

his trial are substantial meritorious claims of law that warrant a new trial. Petitioner asserts that the following exceptional circumstances justify release on bail: He is sixty-one years of age; he has served over eleven years on the sentences imposed in this case; he filed the present habeas corpus action over five and one-half years ago; he is factually innocent of the crimes, as demonstrated by the trial record and as supported by certain testimony during the evidentiary hearing held by the Magistrate Judge; he has substantial business and family ties to the Cleveland area, and; he has numerous friends in Cleveland.

Respondent, remarkably, has not filed a response to petitioner's motion for bail.

The factors pertinent to determining whether a successful habeas corpus petitioner is entitled to bail or bond pending appeal are set forth in *Workman v. Tate*, 958 F.2d 164, 166 (6th Cir. 1992); *see also* Fed. R. App. P. 23. Weighing the factors in light of the specific circumstances of this case, this Court finds that petitioner's release on bail is not warranted at this time. The factors weighing against releasing petitioner on bond pending his appeal include the fact that petitioner has placed himself in positions where acts of violence have occurred, he stands accused of committing three violent felony offenses upon which there exists "substantial" evidence (doc. no. 68, p. 47) of his guilt, the Federal Pretrial Services Report recommends that his motion for bond be denied, and the State of Ohio's interest in continuing petitioner's rehabilitation and ensuring public safety. *See Workman*, 958 F.2d at 166. Since these significant factors outweigh the harm petitioner may incur by remaining incarcerated

pending his new trial, his motion for bail is not well taken at this time. *Cf. id.*

ORDER

This Court hereby **ORDERS** that:

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED.**

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED.** The State of Ohio or the County of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

IT IS SO ORDERED.

/s/ H. J. Weber
Herman J. Weber, Judge
United States District Court

United States Court of Appeals
Sixth Circuit.

Robert O'NEAL, Petitioner-Appellee,
v.
Terry L. MORRIS, Respondent-Appellant.
No. 92-3763.

Argued May 6, 1993.
Decided Aug. 20, 1993.

Rehearing and Suggestion for Rehearing
En Banc Denied Oct. 4, 1993.

State prisoner convicted of aggravated murder, aggravated robbery, and kidnapping petitioner for writ of habeas corpus. The United States District Court for the Southern District of Ohio, Herman J. Weber, J., granted the writ, and state appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that: (1) state's failure to filed timely objections to magistrate's first report did not preclude its appeal, and (2) any error in jury instructions and prosecutor's closing argument pertaining to intent of conspirators or aiders and abettors was harmless, where all evidence upon which jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.

Reversed.

Thomas R. Wetterer, Jr. (argued & briefed), Public Defender's Office, Columbus, OH, for petitioner-appellee.

Suzanne E. Mohr (argued & briefed), Office of the Atty. Gen. of Ohio, Columbus, OH, for respondent-appellant.

Before: MILBURN, RYAN, and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

The state of Ohio, on behalf of warden Terry L. Morris of the Chillicothe Correctional Institute, appeals the district court's order which conditionally granted a writ of habeas corpus on the basis that improper jury instructions and other trial errors rendered petitioner Robert O'Neal's state murder trial fundamentally unfair. We reverse.

I.

In 1981 petitioner was convicted by an Ohio jury of aggravated murder, aggravated robbery, and kidnapping in connection with the death of Henry Podborny. In January 1981 Podborny's estranged wife, Dimple, lured him from his home near Chicago on the pretense that she wished to resolve their marital difficulties. Three months later, authorities discovered Mr. Podborny's corpse in a field in Cleveland.

The evidence at trial revealed a detailed conspiracy among at least six individuals, including Dimple Podborny, her daughter-in-law, and acquaintances, to kidnap, rob, and murder Henry Podborny. The conspirators considered a number of plots, but eventually decided to have Dimple induce her husband to fly to Cleveland. Petitioner would then kidnap and hold him in the basement of an unlicensed saloon petitioner operated, while others would rob Mr. Podborny's residence and business.

On January 29, 1981, Mr. Podborny flew to the Cleveland airport, where Dimple's daughter-in-law, Lola Toney, met him and escorted him to petitioner's saloon. Minutes after Mr. Podborny entered, petitioner exited the bar and handed to Toney Podborny's wallet and other possessions. Soon after, another conspirator, Lloyd Allen, emerged from the bar and informed petitioner and Toney that he had struck Podborny with a pipe.

From January through March, Dimple, Toney, and others engaged in a variety of schemes to make it appear that Mr. Podborny was traveling on business, while they attempted to obtain his money. By late March, Toney believed Henry Podborny was no longer alive. His corpse was discovered a month later. Coroners determined that he had been struck at least five times in the head and shot once in the forehead. Petitioner, Dimple Podborny, Lola Toney, Lloyd Allen, and two others were subsequently indicted for aggravated murder, aggravated robbery, and kidnapping. After the case against three of the conspirators was resolved by a trial and a guilty plea, petitioner, Lloyd Allen, and Dimple Podborny were tried jointly and convicted on all counts. Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and Ohio Supreme Court.

In 1986, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court ruled that petitioner's trial had been fundamentally unfair and conditionally granted the writ. The state filed this timely appeal.

II.

Petitioner first argues that this court should not hear the state's appeal because the state's objections to the magistrate's first report, which recommended that the writ issue, were filed approximately twenty days late. *See* 28 U.S.C. § 636(b)(1) (setting ten-day deadline for objections to magistrate's report). This court held in *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), that a party's failure to file timely objections to a magistrate's report waives that party's right to appeal from the district court's decision to adopt the magistrate's report. *Id.* at 949-50. *See also Thomas v. Arn*, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985) (approving *Walters* rule).

While the district court agreed to strike the state's untimely objections, it declined to adopt the magistrate's entire report. Instead, the court recommitted the case to the magistrate for further consideration. After reconsideration, the magistrate issued a second report, again recommending that the court grant the writ and incorporating much of the reasoning articulated in the first report. The state filed timely objections to the second report, which the district court considered.

It is well established that the *Walters* rule is procedural, not jurisdictional, and that this court may excuse the default in the interests of justice. *Thomas*, 474 U.S. at 155, 106 S.Ct. at 475; *Kent v. Johnson*, 821 F.2d 1220, 1222-23 (6th Cir.), *amended on other grounds* (6th Cir.1987). This court has also concluded that when, as here, a district court considers untimely objections, the justifications for enforcing the *Walters* rule dissipate. *Patterson v. Mintzes*, 717 F.2d 284, 286 (6th Cir. 1983). Therefore, given

the unique facts of this case, we conclude it is in the interests of justice to hear the state's appeal of the district court's decision that the writ be granted.

III.

In *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court recently clarified the standard we must apply on habeas review of state court convictions. If we conclude that a federal constitutional trial error[1] occurred at petitioner's trial, we must ascertain whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict' " such that it resulted in actual prejudice. *Brecht*, ___ U.S. ___, ___, 113 S.Ct. at 1717, 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). The habeas petitioner bears the burden of establishing such prejudice. *Id.*, ___ U.S. at ___, 113 S.Ct. at 1722.

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[1] A constitutional trial error is one which "occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Id.*, ___ U.S. at ___, 113 S.Ct. at 1717 (alterations in original) (citing *Arizona v. Fulminante*, 499 U.S. 279, ___, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991)). Such errors contrast with "structural defects in the constitution of the trial mechanism," such as deprivation of the right to counsel, which require automatic reversal because "they infect the entire trial process." *Id.* The Supreme Court recently noted that jury instruction errors quite similar to that alleged here, involving presumptions about an element of the offense, are amenable to harmless-error review. *See Sullivan v. Louisiana*, ___ U.S. ___, ___, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993).

In petitioner's case, the district court adopted the magistrate's conclusion that the jury instructions given at petitioner's trial "were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to [petitioner]," thereby relieving the state of its burden to prove petitioner's intent to kill beyond a reasonable doubt, in violation of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Initially, we point out that the district court employed an outdated standard for evaluating petitioner's *Sandstrom* claim. The court incorrectly relied upon the test espoused in *Francis v. Franklin*, 471 U.S. 307, 315-16, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985), and *Sandstrom*, 442 U.S. at 514, 99 S.Ct. at 2454, and followed by this court in *Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir.1982), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984), that jury instructions infringe a defendant's due process rights if a reasonable jury *could have* interpreted the instruction as unconstitutionally shifting the burden of proof. However, after reviewing its sometimes inconsistent articulations of the test, the Supreme Court settled on a single standard of review for jury instructions: " 'whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, ___ U.S. ___, ___ & n. 4, 112 S.Ct. 475, 482 & n. 4, 116 L.Ed.2d 385 (1991) (emphasis added) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197, 108 L.Ed.2d 316 (1990)).

With this standard, we turn to the instructions at issue here. Petitioner was charged with aggravated murder, aggravated robbery, and kidnapping. Under Ohio law, a court may instruct the jury on complicity even though the defendant was charged as a principal. *See* Ohio Rev.Code Ann. § 2923.03(A), (F) (Anderson 1992); *Hill v. Perini*, 788 F.2d 406, 407-08 (6th Cir.) (discussing the practice and holding that it does not violate a defendant's right to notice of the charges against him or her), *cert. denied*, 479 U.S. 934, 107 S.Ct. 409, 93 L.Ed.2d 361 (1986). Thus, in petitioner's case, the district court charged the jury that it could find petitioner guilty as a principal, as a coconspirator, or as an aider or abettor.

Charging a defendant as a conspirator or aider and abettor does not, however, alter the government's responsibility to establish intent to kill. Ohio law on complicity provides that for a defendant to be convicted as an aider or abettor or conspirator, he or she must possess "the kind of culpability required for commission of [the principal] offense," here, a purpose to kill. Ohio Rev. Code Ann. §§ 2923.03(A)(2)-(3), 2903.01(A). In other words, Ohio does not adhere to the strict felony-murder rule. *State v. Lockette*, 49 Ohio St.2d 48, 358 N.E.2d 1062, 1070 (1976), *rev'd on other grounds sub nom. Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Nevertheless, Ohio courts permit a jury to infer an aider and abettor's intent to kill when

> the facts show that the participants in a felony entered into a common design and *either* the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony *or* the felony and the

> manner of its accomplishment would be reasonably likely to produce death.

State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375, 382 (1980) (citing *Lockett*, 358 N.E.2d at syllabus ¶¶ 3-4).

Petitioner contends that in attempting to explain these principles of Ohio law, the trial court's instructions unreasonably confused the jury. The court charged that

> [p]urpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants *or co-defendants or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny.

(Emphasis added). Similar instructions were read concerning the intent elements of aggravated robbery and kidnapping. The district court ruled that these instructions deprived petitioner of a fair trial because they improperly suggested that he could be convicted of these offenses as an aider and abettor or conspirator even if only his codefendants, and not petitioner himself, possessed the requisite intent to kill.

However, when read against the backdrop of Ohio complicity law, the court's reference to "defendants or co-defendants or aiders and abettors" appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals ("defendants or co-defendants") or as "aiders and abettors." *See Hill*, 788 F.2d at 407-08. The phrase did not instruct the jury that it could convict petitioner by finding intent to kill in his codefendants or aiders and abettors;

rather, it reminded the jury that they could find that petitioner had intent to kill as a defendant *or* a codefendant *or* an aider and abettor. This reading is supported by the fact that the challenged phrase follows close on the heels of the court's unequivocal statement that "[p]urpose to kill is an element of the crime of aggravated murder." Furthermore, in its instructions, the court stressed at least twice that the jurors "must separately consider the elements applicable to each of the defendants as [if] he or she were separately tried" and not allow their conclusions about one defendant to influence the verdict as to the other defendants.

Moreover, elsewhere in his charge, the trial judge stated:

> The Court in order to assist you understand [sic] the element of purpose and purposely herein, wherein the evidence discloses an existence of complicity by way of aider and abettor and conspiracy, the Court instructs you, as I stated in the law of Ohio as follows: When you have an unlawful act being contemplated in an original conspiracy such as a kidnapping, stealing and so forth, although not identical with or similar to criminal acts charged, if the defendants conspired to commit the unlawful act in the manner in which it was performed *would reasonably and likely produce* the death of another, then each conspirator is equally guilty as the principal offender of the homicide although such conspirator, or person, or defendant, aider and abettor was neither present or had knowledge of the physical killing or the weapon used.

(Emphasis added.) While this instruction also was not ideal, it captured the essence of how a jury might properly infer an aider and abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court. *See Scott*, 400 N.E.2d at 382; *Lockett*, 358 N.E.2d at syllabus ¶¶ 3-4. Accordingly, we conclude that petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill.[2]

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[2] We recognize that in *Clark v. Jago*, 676 F.2d 1099 (6th Cir.1982), this court overturned an Ohio aggravated murder conviction for *Sandstrom* error in instructions that bear some similarity to those given here. *Clark*, however, is both distinguishable on the facts and outdated as a matter of law. In this case, unlike *Clark*, the jury charge provided an adequate statement of the way an aider and abettor's intent may be inferred in Ohio. *See Clark*, 676 F.2d at 1105 (noting that court failed to provide this mechanism to the jury). In addition, the court in *Clark* had charged that defendant "and/or his accomplice" must possess the requisite intent to kill. *Id.* Such an instruction more clearly suggests that intent by only one of the two would suffice for conviction of both defendants. In contrast, the court's reference in petitioner's case to "defendants or co-defendants or aiders and abettors" more likely indicates that the court was merely using three different labels for all three defendants as a group. Any implication that each of the three defendants need not possess the required mens rea is much weaker. However, even if we deemed these factual distinctions insignificant, the legal standards upon which *Clark* based its holding have been superseded by more recent Supreme Court decisions, which have changed both the general standard for habeas review of constitutional trial errors. *Brecht*, ___ U.S. at ___, 113 S.Ct. at 1722, as well as the specific test for constitutional errors in jury instructions. *Estelle*, ___ U.S. at ___ & n. 4, 112 S.Ct. at 482 & n. 4. *Clark* therefore provides not support for petitioner's claim.

Petitioner suggests, however, that the prosecutor's closing argument compounded the potential for jury confusion. The prosecutor informed the jury that to obtain a conviction on a conspiracy theory in Ohio,

> [t]he State is bound to prove to a jury two things. First, that the crimes alleged have been committed. . . . The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

The trial court overruled defense counsel's objection to this misstatement of Ohio law. We agree that this improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach.

Nevertheless, even if this remark, in conjunction with any confusion engendered by the court's instructions on mens rea, could be said to have abridged petitioner's constitutional rights, we conclude that these errors were not of such magnitude that they "had [a] substantial and injurious effect of influence in determining the jury's verdict." *Brecht*, ___ U.S. at ___, 113, S.Ct. at 1722. Petitioner argues that the instructions permitted the jury to find him guilty as an accomplice or conspirator by imputing to him the intent of the principals. However, all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.[3]

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[3] The court's instructions on defendant's liability as a principal clearly required the jury to find that "the killing was done purposely and . . . with prior calculation and design."

Petitioner and Lloyd Allen were in petitioner's bar when Henry Podborny entered, and petitioner exited his establishment with Podborny's wallet and other possessions just minutes later. One witness testified that petitioner had told him that he and Allen had killed a man and placed his body in the field next to the witness' home, where Podborny's corpse was in fact discovered. In addition, physical evidence admitted at trial tended to show that Podborny was killed in petitioner's bar. Authorities found blood of Podborny's type spattered on the walls of petitioner's saloon and discovered paint on Podborny's body that was similar to the paint in the bar. Finally, the prosecutor consistently portrayed petitioner to the jury as a principal. Consequently, any error by the trial court pertaining to the intent of conspirators or aiders and abettors did not injuriously influence the jury's decision to convict petitioner as a principal.

IV.

The district court also held that several rulings of the trial court on the admission of prejudicial evidence, together with the prosecutor's inflammatory closing remarks, deprived petitioner of a fundamentally fair trial. After a careful review of the record, we conclude that these errors were not of constitutional dimensions, but were at most errors in the application of state law. As the decisions of both the Supreme Court and this circuit make clear, "federal habeas corpus relief does not lie for errors of state law" because "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *E.g., Estelle*, ___ U.S. at ___, 112 S.Ct. at 480; *Walker v. Engle*, 703 F.2d 959, 962 (6th

Cir.), *cert. denied*, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). Under federal constitutional standards, the trial court's evidentiary rulings and the prosecutor's comments were not so prejudicial, either individually or in combination, that they rendered petitioner's trial fundamentally unfair.

V.

For the foregoing reasons, we **reverse** the judgment of the district court conditionally granting the writ of habeas corpus.

No. 92-3763

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT O'NEAL, Petitioner-Appellee, v. TERRY L. MORRIS, SUPT., Respondent-Appellant.	)	ORDER

BEFORE: MILBURN, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

SUPREME COURT OF THE UNITED STATES

No. 93-7407

Robert O'Neal,
Petitioner

v.

Terry L. Morris, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition.

April 4, 1994